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REPORTS OF CASES
DECIDED IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK
FROM AND INCLUDING DECISIONS OF OCTOBER 6, TO DECISIONS
OF DECEMBER 8, 1903,
WITH
NOTES, REFERENCES AND INDEX.

By EDWIN A. BEDELL,
STATE REPORTER.

VOLUME 176.

ALBANY
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JUDGES OF THE COURT OF APPEALS.

ALTON B. PARKER, CHIEF JUDGE.

JOHN C. GRAY,

DENIS O'BRIEN,

EDWARD T. BARTLETT,

ALBERT HAIGHT,

CELORA E. MARTIN,

IRVING G. VANN,

ASSOCIATE JUDGES.

EDGAR M. CULLEN,

WILLIAM E. WERNER,

JUSTICES OF THE SUPREME COURT SERVING AS
ASSOCIATE JUDGES.*

* Designated by the Governor January 1, 1900, under section 7 of article VI of the Constitution, as amended in 1899.

ERRATA.

In *Barber v. Brundage* (169 N. Y. at p. 370) in 6th line from top of page after the word "Brundage" strike out the words "a granddaughter of the intestate" and insert "the widow of the intestate's brother Franklin."

In 14th line from top of page strike out the words "also a granddaughter of intestate," and insert "a niece of intestate."

In *People v. Glennon* (175 N. Y. p. 55,) in 5th line from top of page (Penal Code, sec. 332) should read section 322.

In *Ackerman v. True* (175 N. Y. p. 357) in 5th line of Judge MARTIN's opinion, insert the word "northerly" in place of "southerly."

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING OCTOBER 6, 1903.

HOWARD IRON WORKS, Respondent, v. BUFFALO ELEVATING
COMPANY, Appellant.

COUNTY COURTS — JURISDICTION OF, OVER COUNTERCLAIMS EXCEEDING \$2,000 IN AMOUNT. While the jurisdiction of County Courts in actions for the recovery of money only is limited by section 14 of article VI of the Constitution and section 840 of the Code of Civil Procedure to actions in which the complaint demands judgment for a sum not exceeding \$2,000, such limitation is based wholly on the demand of the complaint, and, after jurisdiction of a cause of action has once been acquired, a County Court has, under section 348 of the Code of Civil Procedure, "the same jurisdiction, power and authority in and over the same and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case;" and so the general jurisdiction to entertain common-law actions, where the demand for judgment in the complaint does not exceed \$2,000, carries with it the power to try and render any judgment upon any counterclaim irrespective of the amount that the defendant may plead in his answer to the cause of action stated in the complaint.

Howard Iron Works v. Buffalo Elevating Co., 81 App. Div. 386, reversed.

(Argued June 1, 1903; decided October 6, 1903.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 18, 1903, upon an order which reversed an interlocutory judgment of the Erie County Court overruling a demurrer to a counterclaim.

The nature of the action, the facts, so far as material, and the questions certified are stated in the opinion.

Alfred L. Becker and *Tracy C. Becker* for appellant. The constitutional grant of jurisdiction to County Courts extends to counterclaims and is unlimited as to them. (Const. of N. Y. art. 6, § 14; Code Civ. Pro. §§ 340, 348; *Meade v. Langford*, 56 Hun, 279; *Thomas v. Harmon*, 46 Hun, 75; *Bellinger v. Craigue*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 113; *Buckhout v. Rall*, 28 Hun, 484; *Sweet v. Flannigan*, 61 How. Pr. 327; *Chegaray v. Mayor, etc.*, 13 N. Y. 220; *P. T. Co. v. Harmon*, 43 App. Div. 348.) Unlimited jurisdiction over counterclaims in general in County Courts is necessary for the proper and orderly administration of justice. (*Newell v. People*, 7 N. Y. 9; *People v. Potter*, 47 N. Y. 375; *Lake Co. v. Rollins*, 130 U. S. 662; *People ex rel. v. Wemple*, 125 N. Y. 485; *Hawley v. Whalen*, 64 Hun, 550; *Buckhout v. Rall*, 28 Hun, 484; *Fullmer v. Fullmer*, 6 Wkly. Dig. 42; *Heigle v. Willis*, 50 Hun, 588; *Taylor v. Mayor, etc.*, 82 N. Y. 10; *Cornell v. Donovan*, 14 N. Y. S. R. 687; *Hall v. Hall*, 30 How. Pr. 51.)

Loran L. Lewis, Jr., and *William C. Carroll* for respondent. There is no specific grant of jurisdiction to the County Court over counterclaims. (*Freez v. Ford*, 6 N. Y. 176; *Gilbert v. York*, 111 N. Y. 544; *Judge v. Hall*, 5 Lans. 69; *McCormack v. P. R. R. Co.*, 49 N. Y. 303; *Burnes v. O'Neill*, 10 Hun, 494; *Dake v. Miller*, 15 Hun, 358; *Ham-burger v. Baker*, 35 Hun, 356; *Wilkins v. Williams*, 3 N. Y. Supp. 897; *Leonard v. Lynch*, 62 How. Pr. 56; *A. B. Co. v. Barclay*, 70 App. Div. 260; *Thomas v. Harmon*, 46 Hun, 75; *Avery v. Willis*, 24 Hun, 548.) The County Court has no jurisdiction over the counterclaim contained in defendant's answer. (*Oregan v. Lovell*, 88 N. Y. 258; *Buckhout v. Rall*, 28 Hun, 484; *Irwin v. Met. St. Ry.*, 38 App. Div. 254; *Pennypacker v. Hazelwood*, 61 S. W. Rep. 153; *Wal-*

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

cott v. McNew, 60 S. W. Rep. 18; *Avery v. Willis*, 24 Hun, 548; Code Civ. Pro. § 2949.)

O'BRIEN, J. The plaintiff's complaint was filed in the County Court and judgment was demanded for about \$900, alleged to be due from the defendant for work, labor and materials performed and furnished by the plaintiff at the defendant's request.

The answer, among other things, states that the work, labor and materials described in the complaint were furnished and performed under a contract between the parties whereby the plaintiff contracted to manufacture and install at defendant's elevator, in a good, workmanlike manner, certain machinery described, and the plaintiff warranted the work and materials free from all defects and agreed that the machinery so contracted for should be sufficient and suitable to move, control and regulate the movements of two movable elevator towers, for which the defendant was to pay over \$3,000. That the plaintiff undertook to perform this contract, but the work and materials were so defective and unsuitable that the work was not only worthless, but by reason of the default on the part of the plaintiff to perform the contract the defendant sustained damages in the sum of \$30,000, and this sum was, upon these facts, interposed as a counterclaim in the action.

The plaintiff demurred to the counterclaim upon the ground that the court had no jurisdiction of the subject-matter thereof since the counterclaim demanded a judgment against the plaintiff for more than \$2,000. The County Court overruled the demurrer and gave judgment upon the issue of law in favor of the defendant. The Appellate Division has reversed this judgment, by a divided court, and has certified to this court two questions as follows:

First. Is the County Court without jurisdiction over defendant's counterclaim herein because the amount demanded in said counterclaim exceeds \$2,000?

Second. If the jurisdiction of the County Court over counterclaims is limited, as to amount, to counterclaims wherein

the amount demanded does not exceed \$2,000, is such objection to defendant's counterclaim herein properly taken by demurrer?

The substantial question presented is whether upon the face of the pleadings the County Court has jurisdiction to try the matter involved in the counterclaim and to render judgment thereon. The facts set forth by the defendant in that part of the answer amount to an allegation that the plaintiff did not perform the contract sued upon, and that in itself is matter of defense. But the demurrer deals with the answer only so far as it is a counterclaim and demands an affirmative judgment, and hence the decision below must be deemed to relate only to that phase of the answer.

The provisions of the present Constitution and the Code prescribing the jurisdiction of County Courts are as follows: Article six, section fourteen of the Constitution enacts: "The existing County Courts are continued * * * County Courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The legislature may hereafter enlarge or restrict the jurisdiction of the County Courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant." The Code (§ 340) follows this provision of the Constitution and limits the jurisdiction in cases for the recovery of money only by the demand of judgment in the complaint, which must be a sum not exceeding two thousand dollars.

The view of the case that prevailed in the learned court below would produce some curious results in practice. In this case it is admitted on all sides that the court had complete jurisdiction of the action. The objection is that it has no jurisdiction of the defense by way of counterclaim. It is

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said that there is ample power to hear, determine and award judgment on the plaintiff's claim, but no power to try or give judgment on the defendant's counterclaim, although it arises out of the very transaction stated in the complaint, and the only reason for this contention is that it is stated in the pleading at too large a sum. The large claim stated in the answer may fade away to a very small one after the proofs at the trial are all in, but it is argued that this makes no difference, since the court is without jurisdiction to take any proofs on the merits of the claim. An irresponsible party could implead his neighbor in the County Court in an action wherein he demands just \$2,000. The defendant sued may have a valid counterclaim which he regards as of no value except for defensive purposes, but if it amounts to more than \$2,000 he cannot make use of it as a counterclaim to defeat the plaintiff's claim. If he has no other defense he must submit to have judgment pass against him. If he attempts to set it up to the extent of \$2,000 he must release the balance, since the general rule is that a party cannot split up his claim into fragments and have a separate action upon each fragment. So that a defendant who has been brought into the County Court by the act of the plaintiff in selecting his forum, may have a valid and meritorious defense, but his hands are so tied that he is unable to avail himself of it by reason of the very magnitude of his claim. It is quite clear that a party may in this way select a forum for the litigation in which he has a strategic advantage over his adversary.

The mind does not readily accept the reasoning and arguments that lead to such conclusions. The first impression is that the argument must be faulty at some vital point, and I think the error is to be found in the attempt to enlarge by construction and analogy the express restrictions which have been placed upon the jurisdiction of the County Court by the Constitution and the statute. The restriction as to the amount of the claim is based wholly on the demand of the complaint, but the learned court below has determined the question of jurisdiction upon the demand in the answer. The point of

the decision is that not only is the jurisdiction limited to cases where the complaint demands judgment for a sum of money not exceeding \$2,000, but to cases where the counterclaim contained in the answer does not exceed the same amount. This conclusion is the result of argument and analogy quite outside the words of the Constitution and the statute.

Conceding all that has been said in the learned court below concerning the analogy between the cause of action stated in the complaint and the cause of action stated in the answer by way of counterclaim, the fact still remains that there is nothing in the Constitution or the statute that forbids a defendant, when sued in the County Court, from interposing any defense that he may have to the cause of action stated in the complaint, and if it be a counterclaim exceeding \$2,000, he is not forbidden to plead it, even though an affirmative judgment in his favor would result. The power of the court to render the proper judgment is not limited by the amount of the counterclaim, when jurisdiction of the action is once obtained, but the amount demanded in the prayer of the complaint is the sole test upon that question. In this case when the complaint was served the court acquired jurisdiction of the action and consequently of any defense to it that grew out of the transaction stated in the cause of action, even though it was a counterclaim stated to amount to more than \$2,000. When the plaintiff elected to bring his action in the County Court, the right to try and render judgment upon any counterclaim that the defendant had followed the case as a necessary incident of the jurisdiction, without regard to its amount. The jurisdiction of the County Court is a question that generally concerns the defendant and is usually raised by a defendant sought to be subjected to its jurisdiction. In this case the question is raised by the plaintiff who selected that court as his forum and now contends that the defendant is barred by reason of the limited jurisdiction from interposing defenses that it clearly could interpose had the plaintiff selected any other court. The contention ought not to be sustained unless it appears to rest firmly upon authority, reason and

argument so clear and satisfactory as to be conclusive, and it seems to me that it does not.

It cannot be doubted that the legislature has power under the Constitution to enact that when the County Court acquires jurisdiction of an action by the service of a proper complaint, the court may entertain any defense which the defendant, sued in that court, may have, even though it be a counterclaim alleged to be more than \$2,000, and that, we think, is the effect, substantially, of section three hundred and forty-eight of the Code of Civil Procedure. That section points out with great clearness what the power of the court is, after jurisdiction once acquired: "Where a county court has jurisdiction of an action or special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment or grant either party any relief which the Supreme Court might render or grant in a like case * * *." If the present action had been brought in the Supreme Court no question could be raised with respect to the power to try and render judgment upon the counterclaim, and the plaintiff, having impleaded the defendant in the County Court, upon a complaint that conferred full jurisdiction upon that court, it follows that it had power to render any judgment in favor of the defendant, or grant it any relief that the Supreme Court could in a like case.

There is no express or implied restriction upon the power of the County Court to try issues and render the proper judgment in an action where it has once acquired jurisdiction. It may entertain an action to foreclose a mortgage where the real property mortgaged is situate within the county, and in such cases it may render judgment for a deficiency, whatever the amount may be. (*Hawley v. Whalen*, 64 Hun, 550.) That of course is one of the incidents that necessarily follow the power to render judgment in foreclosure cases. In so far as it is sought to recover a deficiency judgment in such cases upon the bond the action is one for the recovery of

money only and the defendant may interpose, by way of counterclaim, any common-law cause of action he may have against the plaintiff that would tend to defeat or diminish the claim for a deficiency judgment. (*Hunt v. Chapman*, 51 N. Y. 555; *Bathgate v. Haskin*, 59 N. Y. 533.) There is no constitutional or statutory provision that in terms authorizes such practice, but it is a necessary conclusion from the general power of the court to entertain foreclosure actions. So the general jurisdiction to entertain common-law actions where the demand for judgment in the complaint does not exceed \$2,000 carries with it the power to try and render judgment upon any counterclaim that the defendant may plead in his answer to the cause of action stated in the complaint. If there can be any reasonable doubt with respect to this proposition, based upon grounds of reason and justice, it is made clear by the section of the Code above cited. That section is broad enough in its language to permit a defendant in the County Court to interpose any counterclaim that he may have to the plaintiff's demand, and it is safe to assert as a reasonable inference that it was intended by that provision to enable the parties to settle all controversies arising from the transaction stated in the complaint. It could not have been intended that the defendant should be debarred from interposing defenses such as appeared in the answer in this case. These views sufficiently indicate the answer to the questions certified.

We think that the demurrer to the counterclaim was not well taken, and that the judgment of the Appellate Division should be reversed, with costs, and that of the County Court affirmed.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment reversed.

N. Y. Rep.] Opinion of the Court, per PARKER, Ch. J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
FREDERICK E. WADHAMS, Appellant.

CONSTITUTIONAL LAW — PROHIBITION AGAINST USE OF FREE RAILROAD PASSES BY PUBLIC OFFICERS APPLIES TO PALACE AND SLEEPING CAR PASSES — CONST. ART. XIII, § 5. A public officer, who accepts the privilege of riding in a palace or sleeping car accorded to him by a free pass, accepts a free pass and free transportation within the meaning of section 5 of article XIII of the Constitution prohibiting the use by a public officer of free transportation.

(Argued June 4, 1903; decided October 6, 1903.)

APPEAL from a judgment of the General Term of the Supreme Court in the third judicial department, entered May 31, 1895, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought for the purpose of ousting the defendant from his office as notary public, for having accepted from the Wagner Palace Car Company a free pass for his use and benefit, and having used the same upon the cars of said Wagner Palace Car Company while being transported over the line of the Delaware and Hudson Canal Company, in violation of section 5 of article 13 of the State Constitution.

Frederick E. Wadhams for appellant.

John Cunneen for respondent.

PARKER, Ch. J. We held in *People v. Rathbone* (145 N. Y. 434) that a notary public is a public officer within the meaning of the provision of the State Constitution (Art. XIII, § 5) prohibiting a public officer or a person elected or appointed to public office under the laws of this state from receiving from any person or corporation, or making use of "any free pass, free transportation," etc. And necessarily, therefore, the conclusion was reached in that case that the defendant, having received and made use of a free pass over a railroad, the People could maintain an action against him to have his office adjudged to be forfeited.

The difference between that case and this one is that the pass received by Rathbone entitled him to ride upon the lines of the corporation issuing the pass, while in this case the defendant paid his fare, but occupied a seat in a palace car belonging to another corporation, and did not pay for it, but instead presented to the conductor a pass issued by the Wagner Palace Car Company in the name of defendant entitling him, without charge, to accommodations in the palace or sleeping cars of that company running over any railroad in New York state. Accommodations of this kind have come to be regarded as a necessity by a considerable portion of the traveling public, and rather than not have the benefit of such accommodations a substantial percentage of the traveling population pay for the privilege of enjoying them.

We hold — and we think argument is not needed in support of the proposition — that a public officer who accepts the privilege of riding in a palace or sleeping car accorded to him by a pass such as was issued in this case, accepts a free pass and free transportation within the meaning of that portion of section 5 of article XIII of the Constitution which reads as follows: "No public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly ask, demand, accept, receive or consent to receive, for his own use or benefit, or for the use or benefit of another any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another."

It follows that the judgment ousting defendant from his office as notary public should be affirmed, without costs.

GRAY, O'BRIEN, BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

WALTER B. GUNNISON, Respondent, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Appellant.

1. NEW YORK CITY — BOARD OF EDUCATION, NOT THE CITY, THE PROPER PARTY DEFENDANT IN SUITS RELATING TO SCHOOL FUNDS. Under the provisions of the charter of the city of New York (L. 1901, ch. 466) the only relation that the city has to the subject of public education is as the custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disburse the same according to the instructions of the board of education. The city, as trustee, has the title to the money, but it is under the care, control and administration of the board of education, and all suits in relation to it must be brought in the name of the board. A suit to recover teachers' wages is a suit affecting or in relation to the school funds and under the express words of the statute must be brought against the board.

2. SAME. An action brought by a school teacher in the city of New York, to recover wages or salary, when the only object and purpose of such action is to establish the validity of a disputed claim and liquidate the amount, must be brought against the board of education and not against the city.

3. BOARD OF EDUCATION AN INDEPENDENT CORPORATION, NOT A CITY AGENCY. The mere fact that the legislature has made the board of education a member of one of the administrative departments of the city of New York does not indicate an intent to devolve upon the city itself, acting through one of its departments, the state functions which were formerly directly imposed upon the board as a separate public corporation and to relegate it to an agency similar to that occupied by the police, fire, health and other city departments, of which the city is the responsible head; nor does the fact that the charter (§ 1055) expressly authorizes the board to bring suits affecting school property exclude the idea that it may also defend them and prevent it from becoming a party defendant in such cases; nor does section 1614, requiring future suits against the city to be in the corporate name of the city of New York, have any application, since such suits are not against the city but are against another and independent corporation, namely, the board of education.

The fact that the charter enumerates among the administrative departments of the city the board of education, calling it the "Department of Education," of which the board is the head, does not make any change in the corporate powers, duties or liabilities of the board and, therefore, does not affect its legal capacity to sue and be sued.

Nor does the fact that the board is the head of the department exempt it from such suits because it is not a mere agent of the city but is an

independent corporate body whose acts are not the acts of the city and for which the city is not responsible.

Gunnison v. Board of Education, 80 App. Div. 480, affirmed.

(Argued June 2, 1903; decided October 6, 1903.)

APPEAL, by permission, from an interlocutory judgment entered April 4, 1903, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed an order of Special Term sustaining a demurrer to the complaint and overruled such demurrer.

The following questions were certified: "I. Ought the demurrer to the complaint in this action be sustained?

"II. In an action predicated upon a claim for salary alleged to be due teachers under the charter of the Greater New York, is the board of education the proper party defendant?

"III. In an action to recover teachers' wages or salaries should not the action be brought against the city of New York?"

The nature of the action and the facts, so far as material, are stated in the opinion.

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for appellant. There is no legislation anywhere providing that the board of education shall be the defendant in any case. The limit of express legislative sanction is that it may be plaintiff in the particular class of cases which have relation to school property. (L. 1901, ch. 466, §§ 1055, 1614.)

Ira Leo Bamberger for respondent. The board of education of the city of New York is not merely a department of the city government, but an independent corporation. An action by a teacher for salary is properly brought against the board and not against the city. (*Donovan v. Bd. of Education*, 85 N. Y. 117; *Gildersleeve v. Bd. of Education*, 17 Abb. Pr. 201; *Ham v. Mayor, etc.*, 70 N. Y. 459; *Ridenour v. Bd. of Education*, 15 Misc. Rep. 418; *Allen v. City of Brooklyn*, 8 Blatchf. 535.)

O'BRIEN, J. The question in this case is presented by the demurrer to the complaint. The action was to recover an alleged balance of wages or salary of the plaintiff and other teachers in the public schools of Brooklyn. The defendant demurred to the complaint upon the ground that upon its face it did not state a cause of action, and that the city of New York and not the board of education was the proper party defendant. The only question argued is whether the defendant is liable to be sued on account of the matters and things stated in the complaint.

The complaint contains several causes of action separately stated, but all of the same nature and character. One of the causes of action is to recover a sum of money stated to be due to the plaintiff from the defendant as salary or wages, or a balance thereof, as a teacher in one of the public schools of Brooklyn. The other causes of action are to recover a balance of salary or wages alleged to be due from the defendant to the other teachers named in the complaint, the claims for the same having been assigned to the plaintiff. The plaintiff on all the claims demanded judgment for \$1,465.20, with the interest thereon from May 1st, 1899.

The complaint avers and the demurrer admits the following facts: (1) That the defendant is a public municipal corporation. (2) That prior to the month of April, 1899, the plaintiff, being a duly licensed and qualified teacher, was duly appointed by the board a teacher in the public schools, and rendered services in that capacity, performing all the duties of the position. (3) That the salary of the position had been duly fixed by the board at five hundred dollars per month for the month of April, 1899, and but \$400 has been paid. (4) That sufficient funds were appropriated to the defendant and apportioned to the Brooklyn schools to pay the plaintiff's salary. (5) That more than ten days before the commencement of the action the plaintiff presented the claim to the defendant and its financial officer having power to audit and pay the same, and payment or audit was refused. (6) Precisely the same facts with respect to the employment of the

other teachers named, with the amount of salary of each per month, and the balance remaining unpaid and the assignment of each of these claims to the plaintiff. (7) That all the claims were at least thirty days before the commencement of the action presented to the comptroller of the city of New York for payment, but that he neglected and still neglects to adjust or pay the same.

On the face of the pleadings the facts are, therefore, admitted that the defendant, a public municipal corporation employed the plaintiff and the other teachers named in the complaint to teach in the public schools at the agreed salary or compensation alleged, and as to each teacher that it has refused to pay a part of the compensation, and that the sum specified in the complaint remains unpaid, although the services were fully rendered. It remains to inquire what reasons, if any, exist or can be urged why the defendant cannot be sued on account of the matters and things alleged in the complaint, and why the plaintiff must resort to the city for the recovery of his claims, since that is the contention and the only argument in support of this appeal.

It is admitted on the record that the defendant is a public municipal corporation. It is admitted that it employed the plaintiff and the other teachers at a fixed compensation and that a part of this compensation still remains unpaid. This appeal cannot be sustained unless it is shown that these facts do not constitute a cause of action against the defendant and do constitute a cause of action against the city of New York.

The city charter provides that the defendant, the board of education, shall administer all moneys available for educational purposes, and, on the facts stated in the complaint and admitted in the demurrer, it is clear that the plaintiff cannot maintain any action against the city. The mere fact that the public money for the support and conduct of the schools is deposited in the city treasury does not affect the liability of the board of education to be sued, nor does it, upon the facts stated, create any liability against the city. The city has the custody of the money, but the board must administer and

expend all school funds as the representative of the school system, and the financial officer of the city cannot pay out any part of these funds except upon the order and audit of the board. In most of the other counties of the state the county treasurer or some county or town officer has the custody of the school funds, but it cannot be paid out or disbursed except upon the order or audit of the trustees of the proper school district, and these districts are declared to be corporate bodies, thus giving them the power of independent action. (Laws of 1894, chap. 556, art. VI, secs. 42, 43, 44.) So, in the city of New York, the city, of its own motion, has no power to expend or pay out any part of the school funds for the payment of teachers. The plaintiff can make no valid claim against the city until the board of education has audited it through its own proper officer. It is important, therefore, to bear in mind that the plaintiff has no claim against the city until the salary alleged to be due to him and the other teachers has been audited or directed to be paid by the board, and it is admitted by the demurrer that the board has refused to audit the claim or in any manner direct its payment. Hence it is a disputed claim.

It was always the law and is the law still, that an action will lie against the board of education to recover a judgment upon a disputed claim which it has refused to audit or allow. (*Dannat v. Mayor, etc., of N. Y.*, 66 N. Y. 585-588.) A suit at law against the board is the proper proceeding to compel the adjustment or liquidation of the claim. The procedure for the collection of claims such as this was very clearly laid down by this court in the case last cited, in this language: "Under the system that is provided, there was but one way for the board of education to discharge the obligations assumed by its contracts, and that was by a draft drawn upon the city chamberlain, and so long as it was willing to give such a draft its creditors could make no further claim upon it. If it was willing to give a draft and had done all the law required of it, it could not be sued.

"It could not draw the money itself as the draft is required

to be made payable to the person entitled to receive the same, and hence a suit to compel it to pay would be an idle proceeding and in contravention of the statute. But if it refused to give a draft, then the creditor's remedy would be against it. If the claim was undisputed, he might by mandamus compel the giving of the draft. If the claim was disputed, he could sue the board of education in its corporate capacity and having thus established his claim then procure his draft. But he would have no claim against the city until he had in some way obtained such a draft as the law required. When he came with such a draft it would be the duty of the chamberlain to pay. If he refused, having the funds in the treasury, he could be compelled by mandamus to pay, or could probably in an ordinary action be made personally liable for his misfeasance." The liability of the city begins only when it refuses to honor or pay a draft drawn upon it in favor of the creditor by the board of education. There is not, and never was, any law that would permit a school teacher in any of the schools of the city to bring a suit against the city for salary when the right to the salary was disputed by the board of education, and when that body refused to audit or allow it in any form, as in this case.

It is apparent from the general drift of the argument that the learned counsel for the defendant is of the opinion that the employment of the teachers in the public schools and the general conduct and management of the schools is a city function in the same sense as it is in the case of the care of the streets or the employment of police and the payment of their salaries and compensation; but that view of the relations of the city to public education, if entertained, is an obvious mistake. The city cannot rent, build or buy a schoolhouse; it cannot employ or discharge a teacher, and has no power to contract with teachers with respect to their compensation. There is no contract or official relation, express or implied, between the teachers and the city. All this results from the settled policy of the state from an early date to divorce the business of public education from all other municipal interests

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or business, and to take charge of it as a peculiar and separate function through agents of its own selection, and immediately subject and responsive to its own control. To this end it is enacted in the general laws of the state that all school trustees and boards of education shall be corporations with corporate powers, which, of course, includes the power to sue and be sued in all matters relating to the control and management of the schools. (School Law, tit. 8, sec. 7; Gen. Corp. Law, sec. 3, page 974.) These corporate powers are expressly conferred upon this defendant by the city charter. (Sec. 1062.) It needs no argument to prove that a corporation is liable to be sued upon any obligation that it has incurred or any contract made in the transaction of the business for which it was created or for any breach of duty involved in the exercise of its powers. The only purpose for which the defendant was created a corporate body was to conduct a system of public education in a designated division of the state and manage and control the schools therein. This obviously includes the employment and payment of teachers, and none of these powers or functions are conferred upon the city as such. The only relation that the city has to the subject of public education is as the custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disburse the same according to the instructions of the board of education. The city as trustee has the title to the money, but it is under the care, control and administration of the board of education, and all suits in relation to it must be brought in the name of the board. (Sec. 1055.) A suit to recover teachers' wages is a suit affecting or in relation to the school funds, and, hence, under the express words of the statute must be brought against the board.

The defendant is by the terms of the new charter given all the powers and subjected to all the obligations and duties of all previous boards of education or school boards. (Sec. 1058.) It is expressly required to *administer* all moneys raised for educational purposes (Sec. 1060), and, hence, the obligation to

pay the teachers is not only a matter implied in the duty of administration, but inheres in the contract of employment. The defendant is expressly declared to be the representative of the school system of the city in its entirety, and if the defendant is such representative the city is not. (Sec. 1064.) The board is given power to purchase, lease or condemn all real property required for school purposes, and to sell such real and personal property as may not be required for the conduct and management of the schools. (Sec. 1066.) It has power to appoint its own officers, clerks and assistants, all superintendents, architects, janitors, auditors and other employees necessary in the care of the school property, or in the conduct and management of the schools, and to fix the salary or compensation to be paid them (Secs. 1067 and 1068), and, finally, no member of the board of education can hold any office of emolument under the county, state or city government. (Sec. 1061.) It will thus be seen how completely, under the scheme of the city charter, the subject of public education is separated from all other municipal functions.

The proposition sought to be established by this appeal is that a corporate body created for the express purpose of conducting a system of public education, exercising such vast powers and charged with such important duties, is not subject to be sued by a school teacher to recover wages or salary, when the only object and purpose of such a suit is to establish the validity of a disputed claim and liquidate the amount. It is quite certain that during the last fifty years, and ever since a board of education existed in the city of New York, actions of this character have been brought and maintained against it without any question raised or doubt suggested that it was not the proper party. The board still has every power that it ever possessed, and it is still subject to every duty or obligation that ever was imposed upon it. A brief review of some of the cases in this and other courts will show that there never was and cannot now be any doubt with respect to the liability of the board of education of the city of New York to be sued upon any disputed claim or liability arising out of the

exercise of its corporate functions as the sole representative of the school system of the city. In *Donovan v. Board of Education of N. Y.* (85 N. Y. 117) the purpose of the act of 1851 as amended in 1853, and under which the board was organized, was considered. This court noted the fact that under the original statute the title to all school property was vested in the city, as it is now, but that by the amendment of 1853 "all suits in relation to the same should be brought in the name of said board;" a provision that, as we have seen, has been incorporated into the present charter. The purpose of the amendment is stated in these words: "It was apparently one purpose of the provision to rebut the inference of any power in the city government to control the schools, arising from the clause in the original section vesting in the city title to school property." The contention of the learned counsel for the defendant in the case at bar would be a long step in the direction of remanding the schools to the control of the city, since it must logically follow, if the city is the only proper party to be sued for teachers' wages, it must be the party, and not the board, in control of the schools. The management, government and control of the schools is clearly vested in the defendant as a corporate body, and it has been repeatedly held that it was liable to be sued upon its contracts, including the obligation to pay the wages of teachers. (*Steinson v. Board of Education of N. Y.*, 165 N. Y. 431; *S. C.*, 158 N. Y. 125; *Coulter v. Bd. of Education of N. Y.*, 63 N. Y. 365; *O'Leary v. Bd. of Education of N. Y.*, 93 N. Y. 1; *Gildersleeve v. Bd. of Education of N. Y.*, 17 Abb. Pr. 201.) The case first above cited is a very recent one, and the action for teachers' wages was not only sustained, but it was distinctly held that the legal relation between the board and the teacher is one of contract. It is scarcely necessary to add that if the contract of a teacher is with the board it is not with the city, and it would seem to be plain that the proper party to be sued is the one that made the contract, and not a party that did not make it and had no power to make it. This court has still

more recently entertained and decided controversies between the teachers in the public schools of the city and the board of education concerning the right or power of the board to remove teachers or reduce their grade or compensation. (*Matter of Cusack v. Board of Education*, 174 N. Y. 136; *People ex rel. Callahan v. Board of Education*, 174 N. Y. 169.) If it be true, as now contended, that the board is nothing but a mere organ or agency of the city, and that the latter represents the schools, it is plain that the proceedings in these cases were brought against the wrong party, and should have been brought against the city instead of the board. It is quite remarkable, however, that neither of the counsel in the case nor any member of the several courts through which the cases passed, ever thought of the point now raised. The reason for this is very obvious, since the board, being charged by the charter with the control and management of the schools and the administration of the school funds, and representing the entire school system, it was the proper party and the proceedings would not lie against the city, as it had no power to restore the teachers to their former positions or to fix their compensation.

Actions and special proceedings of almost every conceivable character have been so often brought and maintained against the defendant, the board of education, that the present contention would seem to be without any support in reason or authority. Suits have been repeatedly maintained against the defendant on contracts for building or repairing schoolhouses (*McGregor v. Board of Education of N. Y.*, 107 N. Y. 511; *Van Dolsen v. Bd. of Education of N. Y.*, 162 N. Y. 446; *Dwyer v. Bd. of Education of N. Y.*, 165 N. Y. 613); and so mandamus proceedings have been instituted against the board to compel the delivery of papers (*People ex rel. Hoffman v. Board of Education of N. Y.*, 141 N. Y. 86); to compel payment of teachers' salaries (*People ex rel. Steinson v. Bd. of Education of N. Y.*, 158 N. Y. 125); or to compel an increase of salary or reinstatement of teachers (*People ex rel. Murphy v. Board of Education of N. Y.*, 173 N. Y. 607; *People ex rel. Christie v. Bd. of Education of N. Y.*,

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167 N. Y. 626); and certiorari proceedings have been brought to review certain acts of the board (*People ex rel. Hoffman v. Board of Education of N. Y.*, 143 N. Y. 62; *People ex rel. Fisk v. Board of Education of N. Y.*, 142 N. Y. 627). It is quite true that some of the special proceedings referred to above were not successful, but were denied or dismissed; that, however, was not for the reason that the defendant was not the proper party. The decisions in those cases were based upon the merits of the controversy or on some question of practice, but no one suggested that the suit or proceeding should have been brought against the city instead of the board of education, and that is the sole question with which we are now concerned.

It is very plain, therefore, that the contention on the part of the defendant, that it is not the proper party to be sued, cannot be sustained unless it is shown that some change has been made in the statute law on the subject by recent legislation. The contention of the learned counsel for the defendant is that a radical change has been effected in this respect, and that the law of fifty years has been superseded by the enactment of the present charter, and it is upon this contention that this appeal must stand or fall. The following statement, taken from the printed argument in support of the appeal, clearly discloses the counsel's position with respect to the right to bring suits of this character against the board of education under the present charter: "What we urge in this connection is that the legislature in making the board of education a member of one of the administrative departments of the city of New York have devolved upon the city itself, acting through one of its departments, the state functions which were formerly directly imposed upon the board of education as a separate public corporation. In this respect the board of education is similar to the department of health, the police department, the department of public charities and the fire department. No more reason exists for holding that a common-law action should be brought against the board of education than for holding that such actions should be

brought against the members of the other departments above named."

Surely, if this is a correct statement of the law a great change has been made, which we would naturally expect to find clearly expressed in the new charter, since it is in that charter that we still find all the statutory provisions quoted above, and notably that provision wherein it is declared that the board of education shall, in its corporate capacity, represent the entire school system. If the state has departed from the settled policy that has prevailed since its organization, of keeping the work of public education and the control and management of its schools separate and distinct from all other municipal interests and business by the selection of its own agents, and clothing them with corporate powers to represent the schools, such as school districts and boards of education, and has devolved these powers and duties directly upon the city, we would naturally expect to find such a departure and notable change expressed in language so clear that no doubt could arise as to this change of policy. If the board cannot be sued for teachers' wages and the teacher must resort to a suit against the city, then surely the board must have sunk into a mere city agency, and it no longer has any use for independent corporate powers. Public education then becomes a city function, exposed to the taint of current municipal politics, and to any and every general mismanagement that may prevail in city departments.

But we still have the very plain provisions of the charter declaring that the board is the representative of the entire school system, and has the power to administer all school funds, and is vested with the right to manage and control all school property, followed by the provision that "suits in relation to such property shall be brought in the name of the board of education." But the learned counsel for the defendant explains away all these provisions in his printed brief in the following words: "There is no express legislation as to the relation of the board of education to law suits except that, under the provisions of this section, suits affecting school

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property shall be *brought* in its name. There is no language anywhere providing that the board of education shall be a defendant in any case. The limit of express legislative sanction is that it can be plaintiff in a particular class of cases, which have relation to school property. This special provision on the subject excludes other cases, and in connection with the general provision in section 1614 of the charter above quoted, impels the conviction that the legislature intended that suits other than such as are here expressly mentioned should be brought against the city of New York."

The meaning of this proposition is that under the present charter the board of education may bring suits as plaintiff, but cannot be sued as a defendant, and when applied to this case it means that the board may sue teachers and others for breach of their contracts, but the teachers and others cannot sue the board for salary, wages or compensation. No argument is necessary to refute this proposition. The bare statement that a corporate body exercising full control and management of the schools and representing the school system in its entirety may *bring* suits in all matters relating to the schools, but cannot be sued upon claims or demands arising out of the management and conduct of the corporate business, is such an extreme and unreasonable view of the legal relations between the board and the teachers, that the proposition refutes itself.

We have seen that the policy of this state for more than half a century has been to separate public education from all other municipal functions and intrust it to independent corporate agencies of its own creation, such as school districts and boards of education, with capacity to sue and be sued in all matters involved in the exercise of their corporate powers. We have seen that during this long period of time this court and all the courts of this state have accepted this rule and acted upon it, and not until now, and in this case, has any question been raised with respect to the right of a teacher to bring suit against the board of education to recover salary or wages. In no part of the state have suits of this character so frequently arisen as in the city of New York, under the charter of

that city, and in no instance has any doubt been suggested that the board was not the proper party defendant or that the city was. The learned counsel for the defendant must, therefore, be able to point to some new and plain provision of the present charter that abolishes the long-settled policy of the state and reduces the board of education to a mere city agency, incapable of being impleaded in the courts as a defendant upon one of the contracts that it made for the employment of teachers in the schools. He has been able to point out but two sections that even in his own view give the slightest support or color of support to his contention, and it will be seen that neither one of these sections when fairly examined has any effect whatever upon the powers, duties and obligations of the defendant as they have always existed in successive charters and have been applied by the courts to actions of this character.

The first provision relied upon as a foundation for the radical change suggested is to be found in section 1644 and reads as follows: "All future suits by or against the city of New York as hereby constituted, or against any of the municipal and public corporations in this act united and consolidated, shall be in the corporate name of the city of New York." This section has not the slightest reference to the board of education, but simply points out how suits against the city of New York must be brought. It has no application whatever to this case, since this is not a suit against the city nor against any of the political divisions united and consolidated with it, but against another and independent corporation, namely, the board of education. The meaning and purpose of this provision is very obvious. Prior to the enactment of the present charter the corporate name and style of the city was "The Mayor, Aldermen and Commonalty of the City of New York," and all suits had to be brought against it in that name. (Cons. Act, sec. 26.) In the enactment of the new charter this provision of course had to be changed, and by the first section, the old city, with certain other cities, towns, counties and other political divisions united and consolidated with it are to

form a new municipal corporation to be known as "The City of New York." Having changed the name of the city and having abolished and taken into it various other municipal corporations theretofore existing, capable of bringing suits and being sued in the name by which they had been known before, the legislature thought it wise and necessary to prescribe how and in what name or form the new city was to sue or be sued. There is nothing new in this provision; it was always the law under every charter that suits by or against the city must be brought in the corporate name, and that is all that this provision was intended to accomplish or does accomplish. It does not contain even the most remote suggestion that suits by or against the board of education, that had always been brought and maintained by or against that corporate body, were thereafter to be brought by or against the city, and does not touch such actions at all, but leaves them just where they were before. It is an erroneous idea to suppose that this provision of the charter operated to make any change with respect to suits against the board of education which had always been maintained since the board was organized and given the management and control of the school system.

The other provision of the present charter, which it is said is new and makes a radical change with respect to the proper party defendant in such actions as this, is to be found in section 96, where the administrative departments of the city, fifteen in number, are enumerated. The board of education is there called the "Department of Education," and the head of the department is to be called the board of education, and shall consist of forty-six members. (Sec. 108.) It is difficult to see how the mere listing of the board of education among the city departments makes any change in its corporate powers, duties or liabilities. It possesses every power now that it ever had, and much more. The legal capacity to sue or be sued that was always inherent in it as a corporate body, and in terms conferred by express statute has not been affected or taken away by calling it "The Department of Edu-

cation." It is still the sole representative of the school system, with exclusive powers to control, manage and administer all school property and school funds. If enumerating the board as a corporate body among the departments did not make it any greater than before, it certainly could not make it any less. It was not shorn of the capacity to be sued which it always possessed, or of any of its powers or functions, by being promoted to the dignity of a department. Moreover, the provision was not new. The board of education was made a city department by the charter of 1873, and under the charter of Brooklyn, where this case originated, the board of education was always classified as one of the departments of the city, but no one ever before supposed that by conferring that title upon it the legislature thereby deprived it of the capacity to be sued, which is a common characteristic of all corporate bodies.

But it is said, and this is the reasoning process in support of the argument, that since an individual head of a department cannot be sued for his official acts, it must follow that the head of a department being a corporate body is likewise exempt from such suits. That argument rests entirely upon a *non sequitur*. The head of a city department who is a natural person, is a mere agent of the city; *his acts* are the acts of the city and the city alone is responsible for them, but the board of education is an independent corporate body created for the particular purpose of exercising specific statutory powers as the sole representative of the school system, and its acts are in no sense the acts of the city, and the city is not responsible for them, as this court has often held. The board is the lineal successor of the old school districts, with powers much enlarged, and it might just as well be argued that these districts in the rural part of the state could not be sued, but that the action must be brought against the village, the town or the county. If a great corporate body, exercising such vast powers as are conferred upon this defendant, cannot be sued for the wages of teachers that it employs, it would be difficult to justify such actions against the school districts in other parts of the state. But the argument that the defend-

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ant's capacity to be sued is lost in consequence of placing it upon the list of city departments, if it proves anything at all, proves too much. If it proves that the defendant cannot be sued in matters relating to the schools, it must prove that it cannot sue. If it proves that the board cannot be made a defendant, it must prove that it cannot be a plaintiff, since the individual head of a city department has no more capacity to be sued than to sue. The reasoning and argument by means of which it is sought to establish the proposition that a corporate body charged with the duties and intrusted with powers to conduct a system of public education in the chief city of the state is capable of bringing suits in all matters relating to the corporate functions, but incapable of being made a defendant in suits by others in matters growing out of the exercise of these functions, is certainly not very powerful or persuasive. From whatever point this contention is viewed, it will be found to be without any legal basis. The facts stated in the complaint and admitted by the demurrer constitute a good cause of action against the defendant, but no cause of action whatever against the city. The demurrer was not well taken, and hence the judgment of the learned court below overruling it is right, and should be affirmed, with costs. These views sufficiently cover the questions certified.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

BARRETT CHEMICAL COMPANY, Respondent, v. JULIUS STERN,
Appellant.

TRADE MARK — WHEN COMMON ENGLISH WORDS, OR A COMBINATION THEREOF, CANNOT BE ADOPTED AS SUCH. An exclusive proprietary right to the use of a common English word, or a combination of such words, for the purpose of identifying the class, grade, style or quality of a commercial article, or for any purpose other than a reference to or indication of its ownership, cannot be acquired by the prior adoption and use thereof upon the label of any article, and the subsequent employment

of such word or combination of words by another to describe the character, quality and use of a similar article does not constitute a trespass or infringement of a trade mark.

Barrett Chemical Co. v. Stern, 71 App. Div. 616, reversed.

(Argued June 24, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 19, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adolph L. Pincoffs and *Arthur Furber* for appellant. The use by the defendant of the words "Warranted Chemical Roach Salt" is no infringement of any trade mark owned by the plaintiff. (*Clotworthy v. Schepp*, 42 Fed. Rep. 82; *C. M. Co. v. Alcorn*, 150 U. S. 460; *Gessler v. Grieb*, 80 Wis. 21; *Gilman v. Hunnewell*, 122 Mass. 139; *L. H. H. D. Co. v. Stucky*, 46 Fed. Rep. 624; *Keasbey v. B. C. Works*, 142 N. Y. 467.) This action cannot be maintained on the ground that the defendant has been guilty of unfair competition. (*Day v. Webster*, 23 App. Div. 601; *E. W. Co. v. I. W. Co.*, 179 U. S. 665; *C. Co. v. Marshall*, 97 Fed. Rep. 785; *Fischer v. Blank*, 138 N. Y. 244; *S. Mfg. Co. v. J. Mfg. Co.*, 163 U. S. 169; *Higgins v. H. S. Co.*, 144 N. Y. 462; *C. C. Co. v. Maxton*, L. R. [App. Cas. 1899] 336.)

Charles B. Meyer for respondent. Plaintiff's word "Roachsault" is a valid trade mark for an insecticide. (*Keasbey v. B. C. Works*, 142 N. Y. 473; *Burnett v. Phalon*, 3 Keyes, 594; *Waterman v. Shipman*, 130 N. Y. 310; *Selchow v. Baker*, 93 N. Y. 65.) The word "Roachsalt" as used by the defendant is an imitation of plaintiff's trade mark "Roachsault." (*Keasbey v. B. C. Works*, 142 N. Y. 474; *Waterman v. Shipman*, 130 N. Y. 310.) Defendant's use of the word "Roachsalt" is with intent to defraud the plaintiff and deceive the public, and such is the result. (*Vulcan v.*

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Meyer, 139 N. Y. 367; *Mfg. Co. v. Trainor*, 101 U. S. 51; *Fairbanks Co. v. Luckel*, 102 Fed. Rep. 327; *Fairbanks Co. v. Bell*, 77 Fed. Rep. 869; *S. W. L. Co. v. Cary*, 25 Fed. Rep. 125; *Von Munn v. Frash*, 56 Fed. Rep. 830; *Waterman v. Shipman*, 130 N. Y. 311; *Lever v. Goodwin*, L. R. [35 Ch. Div.] 1; *Selchow v. Baker*, 93 N. Y. 65; *A. M. Co. v. Spear*, 2 Sandf. 608.) Defendant is guilty of unfair competition. (*Fuller v. Huff*, 43 U. S. C. C. A. 454; *M. B. Co. v. C. & M. B. Co.*, L. R. [App. Cas. 1899] 83; *Carlsbad v. Kutnow*, 71 Fed. Rep. 167; *A. W. W. Co. v. U. S. W. Co.*, 173 Mass. 85; *Block v. Standard*, 95 Fed. Rep. 978; *Koehler v. Sanders*, 122 N. Y. 74.)

O'BRIEN, J. The plaintiff is the assignee of what is claimed to be a trade mark, or business label, which had been adopted by another company some time before the assignment, and used to advertise a preparation known as "Roachsault," for destroying roaches and other insects. The defendant manufactures and sells an article to be used for the same purpose with what is alleged to be a trade mark and label which describes the article as "Roach salt." The plaintiff has condensed into one word the description of the article, with a peculiar spelling of salt, while the defendant uses two words with the ordinary and correct spelling.

The plaintiff contends that the use by the defendant of the words and label amounts to a trespass or infringement of his trade mark, and in this contention he has been sustained by the courts below, and the defendant has been enjoined by the judgment from using the word in his business. The complaint avers the use by the defendant of a label sought to be enjoined in which the most prominent feature displayed is that of a large roach or insect, with the words "Stern's Insectago" upon the body of the insect, with other words descriptive of the article and what it does in the way of destroying insect life. The most prominent words upon the label are, "Warranted Chemical Roach Salt," and the last word contains the only possible similarity between the two labels. In all other

respects they are entirely different. The defendant's label differs in size, color, workmanship and descriptive words from that of the plaintiff, and any one intending to purchase the plaintiff's goods could not be misled by the defendant's label. It is not claimed or averred in the complaint that the public have been deceived by the use of the word by the defendant, or that there was any such intent or purpose on his part to deceive.

The question, therefore, is whether the plaintiff has such an exclusive proprietary right to the use of a common English word, or a combination of such words, as to entitle him to debar all others from the use of the same in the absence of fraud or intent to deceive. The word "Roach" can be used as descriptive of the common insect whose life is sought to be destroyed by the use of the article, and so the word "salt" may be used since it is a word in common use to describe chemical preparations and an article for the preparation of food. The two words may be united and used as one word to describe a salt to be used for the purpose of destroying roaches. Where a common word is adopted or placed upon a commercial article for the purpose of identifying its class, grade, style or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade mark. Words of this character correctly describing the purpose to which the article is to be put cannot be exclusively used as trade marks. (*Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Cooke & Cobb Co. v. Miller*, 169 N. Y. 475.) The office of a trade mark is to point out distinctively the origin or ownership of the article to which it is affixed, and no sign or form of words can be appropriated as a valid trade mark which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose. (*Elgin National Watch Company v. Illinois Watch Case Company*, 179 U. S. 665.) The sole question in the case is whether the plaintiff has a technical trade mark that has been invaded by the act of the defendant. Both parties are engaged in the same

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business and both have made use of a common word to describe the character, quality and use of an article for destroying insect life. The fact that the plaintiff made use of the word before the defendant did not give him the exclusive right to it since it was merely descriptive of the article. There is no allegation or finding that any fraud was intended or committed, or that the defendant by the use of the word palmed off his goods to the public as the goods of the plaintiff. The case in its legal aspect is practically the same as if each party had labeled his goods "Roach Poison" instead of "Roach Salt." They are all common descriptive words indicating to the purchaser of the article that it was a powder or preparation for destroying roaches or other insects, and when the two labels are compared with respect to size, color, character and advertising caption, descriptive of the thing to which it is attached, they are so dissimilar that it is scarcely possible that any observer possessing reasonable intelligence who wanted to procure the plaintiff's goods would be likely to be deceived or mistake the defendant's article for that of the plaintiff's.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., BARTLETT, VANN, CULLEN and WERNER, JJ., concur; MARTIN, J., absent.

Judgment reversed, etc.

WATTS T. LOOMIS, Appellant, v. THE CITY OF LITTLE FALLS et al., Respondents.

LITTLE FALLS (CITY OF)—VALIDITY OF PROVISIONS OF CHARTER PROHIBITING MAINTENANCE OF ACTIONS TO SET ASIDE OR ANNUL ASSESSMENTS FOR LOCAL IMPROVEMENTS UNLESS COMMENCED WITHIN PRESCRIBED TIME AND IN COMPLIANCE WITH PRESCRIBED CONDITIONS. The legislature having power to absolutely prohibit an action to set aside, cancel or annul any assessment made for a local improvement, such power necessarily includes the power to prohibit the commencement of such an action unless specified conditions are complied with; it, therefore, had the power to enact the provisions of the charter of the city of

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Little Falls (L. 1898, ch. 199, § 83, as amd. by L. 1899, ch. 289), providing that no such action shall be maintained by any person unless "commenced within thirty days after the delivery of the assessment roll and warrant for such local improvement to the city treasurer and notice by him in the official newspapers of the city of the receipt thereof, and unless within said thirty days an injunction shall have been procured by such person from a court of competent jurisdiction restraining the common council from issuing the assessment bonds hereinafter provided to be issued for such assessment," and such provision is valid and is a bar to any action not commenced within the time, and in compliance with the conditions, therein prescribed.

Loomis v. City of Little Falls, 66 App. Div. 299, affirmed.

(Argued June 22, 1903; decided October 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 21, 1901, reversing a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. M. Mills for appellant. Plaintiff is not within the scope of the limitation prescribed by section 83 of the city charter. The action is one to remove a cloud on title and the setting aside, canceling or annulling of the assessment which is sought is only to the extent that it forms a lien and cloud upon the title. (*Scott v. Onderdonk*, 14 N. Y. 9; *Breman v. City of Buffalo*, 13 App. Div. 453; *Diefenthaler v. City of Rochester*, 111 N. Y. 331; *Trimmer v. City of Rochester*, 45 N. Y. S. R. 307; *Smith v. Reid*, 134 N. Y. 568; *Parmenter v. State*, 135 N. Y. 154; *Rockford v. Knight*, 11 N. Y. 308.)

George J. O'Connor for respondents. This action was not commenced within thirty days after the delivery of the assessment rolls and warrant to the city treasurer and notice by him in the official papers of the receipt thereof, as required by section 83 of the city charter. (L. 1899, ch. 289, § 83.) The legislature had power to enact this statute and it was a valid exercise of their power. (*Matter of Bridgeford*, 65 Hun,

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227; *Astor v. New York*, 62 N. Y. 580; *Conde v. City of Schenectady*, 164 N. Y. 258; *Ensign v. Barse*, 107 N. Y. 329.)

PARKER, Ch. J. The determination of the Appellate Division must be affirmed because this action was not commenced within the period provided by the city charter.

The complaint alleges in detail the omission of the local authorities to comply with certain requirements of the city charter in proceedings taken to build certain sewers and grade a portion of a street, the expense of which was assessed upon property owners benefited, which it was alleged rendered the assessment void; and the relief demanded in the complaint was

I. That all of the said taxes and assessments mentioned and described in the foregoing complaint be vacated and set aside.

II. That the defendants, their officers, agents, subordinates and employees, be enjoined and restrained from in any manner collecting or attempting to enforce the collection or payment of said taxes and assessments.

III. For such other or further judgment or relief that may be just and proper.

IV. For the costs of this action.

Section 83 of the city charter, as amended by chapter 199, Laws of 1898, and by chapter 289, Laws of 1899, provides in part as follows: "No action or proceeding to set aside, cancel or annul any assessment made for local improvement under any of the provisions of this act shall be *maintained by any person unless* such action or proceeding *shall have been commenced within thirty days* after the delivery of the assessment roll and warrant for such local improvement, to the city treasurer and notice by him in the official newspapers of the city of the receipt thereof, *and unless within said thirty days an injunction shall have been procured* by such person from a court of competent jurisdiction restraining the common council from issuing the assessment bonds hereinbefore provided to be issued for such assessment."

This action was commenced March 29, 1900, and more than 30 days after the delivery of the assessment roll and warrant for such local improvement to the city treasurer and notice by him in the official newspapers of the receipt thereof for the roll and warrant were delivered to him December 26, 1899, and notice of receipt was given by him as required by the charter January 4, 1900.

It is true, as the learned counsel for the plaintiff contends, that it is an acknowledged branch of equity jurisdiction to remove clouds from the title to real property, but the legislature has the power to deprive parties of that particular remedy. It may not deprive them of every remedy, but so long as an adequate remedy is afforded to a party injured the legislature acts within its authority when it deprives the courts of power to give relief in certain forms of actions.

In *Lennon v. Mayor, etc., of N. Y.* (55 N. Y. 361) the original assessment was invalid, but the court held that the assessment could not be vacated or canceled because section 7 of the act of 1872 provided that no assessment for local improvements "shall be vacated or set aside for omission," etc., including the omission which the court said invalidated the original assessment. The court said, Judge RAPALLO writing: "It was competent for the legislature to deprive the courts of the power to give this relief, and the parties of the benefit of this form of remedy. * * * If the assessment in question has not been effectually validated, the plaintiffs may resist its collection, or the title of any purchaser who may claim by virtue of a sale had under it. Their constitutional rights will then come directly in question. But no such right is violated by precluding them from taking the initiative to remove the apparent lien upon their property."

In *Mayer v. Mayor, etc., of N. Y.* (101 N. Y. 285) the court considered section 897 of the Consolidation Act, which forbade a suit in equity to vacate any assessment in the city, or remove a cloud on title, and it was held that the plaintiff could not have the specific relief which he sought, because denied to him by the statute.

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To the same effect is *Matter of Bridgford* (65 Hun, 227), where the court in its opinion cites and comments upon a number of cases.

It is, therefore, settled by authority that it was within the power of the legislature to have provided by section 83 that no action should be brought to cancel, annul or set aside any assessments made for land improvements. But it did not go so far, and instead limited the bringing of such an action to a period of 30 days after the delivery of the assessment roll and warrant to the city treasurer, and notice by him in the official newspapers of the city of receipt thereof, and conditioned further that within such 30 days he procure an injunction restraining the common council from issuing the assessment bonds.

The reason for requiring the commencement of the action and the granting of an injunction is apparent. The fact that no action has been brought when such a statute exists assures the would-be purchaser of the bonds that he is not in danger of being subjected to litigation in the event of purchase, and hence the bonds are likely to sell at a higher price than when there is some uncertainty about it.

But whether the reasons be adequate or not the power of the legislature to absolutely prohibit the bringing of such an action — which, as we have seen, is established — necessarily includes the power to prohibit the commencement of such an action unless specified conditions be complied with.

The order should be affirmed, and judgment absolute for defendant rendered on the stipulation, with costs.

O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ., concur; MARTIN, J., absent.

Order affirmed, etc.

ROCHESTER AND LAKE ONTARIO WATER COMPANY, Respondent,
v. THE CITY OF ROCHESTER, Appellant.

1. WATER COMPANY INCORPORATED UNDER TRANSPORTATION CORPORATIONS LAW (L. 1890, CH. 566, AS AMD. BY L. 1892, CH. 617) FOR THE PURPOSE OF SUPPLYING WATER TO TOWNS AND VILLAGES ADJACENT TO A CITY — WHEN IT MAY LAY ITS WATER MAINS AND PIPES THROUGH THE CITY — WHEN ENTITLED TO INJUNCTION RESTRAINING THE CITY FROM PREVENTING THE LAYING OF WATER PIPES. Where a water works company, duly incorporated under the provisions of the Transportation Corporations Act (L. 1890, ch. 566, as amd. by L. 1892, ch. 617), for the purpose of supplying water to certain villages and towns lying upon opposite sides of a city, has paid the organization charges imposed by the statute and has located and procured a right of way through the towns lying on the westerly side of the city, as required by the statute, and has obtained by a contract with a railroad company the right to lay its water mains upon the railroad's right of way through the city and the town on the easterly side of the city to villages upon the line of the railroad, and has also entered into a contract with another corporation to construct its water plant and lay its water mains and pipes, and made agreements to supply water to a number of manufacturing establishments in the towns, outside of the city, and to supply the railroad company with the water that it requires in the city and at its stations along the route of the water company, the franchise rights of the water company have become vested thereby, and the company has the right and power, under section 82 of the statute, to lay its water mains along the route which it has adopted and located upon the railroad's right of way through the city, without the consent or permission of the authorities of the city, and is entitled to an injunction restraining the city, its officers, agents and servants, from interfering with or preventing it from laying its water pipes or mains across the streets of the city intersected by the railroad's right of way.

2. WHEN ORDINANCES ADOPTED UNDER PROVISIONS OF THE CHARTER OF THE CITY HAVE NO APPLICATION TO THE LAYING OF WATER MAINS THROUGH THE CITY — WHEN SUPERINTENDENT OF WATER WORKS OF CITY MAY NOT INTERFERE WITH WATER PIPES AND MAINS PASSING THROUGH THE CITY — EFFECT OF STATUTES ENACTED AFTER WATER COMPANY'S RIGHTS HAVE BEEN ACQUIRED. Ordinances adopted by the common council of a city, after the passage of the Transportation Corporations Law, for the purpose of regulating the opening of street surfaces for the laying of gas and water pipes and the making of sewer connections, although authorized by the charter of the city, have no application to and cannot regulate or prohibit the laying of water mains through the

city by a water company organized under the statute in question for the purpose of supplying water to adjacent towns and villages, since the legislature could not have intended to vest in the common council the right to repeal or amend, by ordinance, a general statute of the state; neither do the provisions of the charter of cities of the second class, (L. 1898, ch. 182) under which, in connection with special statutes not inconsistent therewith, the city, in this case, is now acting and by which the commissioner of public works is empowered to appoint a superintendent of water works to see that the city is supplied with wholesome water for public and private use, give such superintendent any power to prohibit the laying of water pipes under the general laws or control the water of a corporation organized under the Transportation Corporations Law so long as it is only passing through the city in the mains of the company for use elsewhere; nor can the vested rights acquired by the company in pursuance of its corporate purposes be affected by subsequent statutes enacted for the purpose of preventing the company from laying its pipes within the territory of the city.

3. WHEN WATER WORKS COMPANY NOT REQUIRED TO GO AROUND CITY WITH ITS WATER MAINS AND PIPES. Although the water company could have located its line around the city by going a longer distance through a town not named in its certificate of incorporation, it need not do so where such town does not directly intervene between the towns to be supplied with water and named in such certificate, or furnish the direct, natural and feasible route between the same.

4. POSSIBILITY THAT WATER COMPANY MAY BECOME COMPETITOR OF CITY IN SUPPLYING WATER TO CONSUMERS WILL NOT PREVENT COMPANY FROM LAYING WATER MAINS AND PIPES THROUGH THE CITY. Notwithstanding the fact that such water company may become a competitor of the city which owns and operates a municipal water plant which supplies water to its inhabitants for domestic and manufacturing purposes, and has for many years supplied water to the railroad company upon whose right of way the water company has located its route through the city and with which it has contracted to furnish water at a lower rate than that at which the city has furnished it, such fact does not affect the statutory right of the water company to run its mains through the city in order to comply with the purposes of its grant; when the company attempts to supply water to the inhabitants of the city within its territorial limits, the power to do so may then be questioned by the municipality, and the courts may then be called upon to determine the extent of its powers in that regard.

5. WHEN CITY MAY NOT ATTACK VALIDITY OF WATER COMPANY'S RIGHT OF WAY THROUGH THE CITY UPON LANDS OF RAILROAD COMPANY. Whether the water company has obtained from the railroad company a valid right of way along its lands is a question that cannot be raised by the city so long as the railroad company does not question or oppose such right.

6. LOCAL AUTHORITIES SHOULD BE GIVEN REASONABLE CONTROL IN SUCH CASES AS TO THE STREETS TO BE USED, AND THE PLACE AND MANNER IN WHICH THE PIPES SHOULD BE LAID. While the justice of the provision which permits the laying of water pipes through an adjoining municipality, and thus preventing such municipality from depriving its neighbors from receiving a supply of water, where such municipality happens to intervene between the source of supply and the place of distribution, is fully recognized, it is suggested that the legislature might properly have placed some restriction upon the use of the streets in cities and possibly in villages that should be made by water companies; that the city or village authorities should be given some voice as to the streets that should be used, and the place and manner in which the pipes should be laid therein; and that it should not be left entirely to the judgment and discretion of the officers of the water company to place its pipes wherever they please, without regard to the wishes or reasons of the officers of the city who may desire to have them placed elsewhere.

Rochester & Lake Ontario Water Co. v. City of Rochester, 84 App. Div. 71, affirmed.

(Argued June 12, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 27, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

William A. Sutherland and *John Van Voorhis* for appellant. Plaintiff's charter does not permit it to do any business in the city of Rochester. (*Jemison v. C. S. Bank*, 122 N. Y. 135; *People ex rel. v. Campbell*, 144 N. Y. 166; *Pearce v. M. & I. R. R. Co.*, 62 N. Y. 441; *Leslie v. Lorillard*, 110 N. Y. 519; *Kent v. Q. M. Co.*, 78 N. Y. 159; *Zanesville v. G. L. Co.*, 47 Ohio St. 1.) The plaintiff was not given any right to cross any of the streets of Rochester without the permission of the local authorities. (*Townsend v. Little*, 109 U. S. 504; *Lewis v. City of Syracuse*, 13 App. Div. 587; *Matter of M. H. Bank*, 153 N. Y. 199.) The two special statutes of 1903 effectually bar the plaintiff from the streets of Rochester. (*People ex rel. v. Spicer*, 99 N. Y. 225;

Wood v. Wellington, 30 N. Y. 218.) The plaintiff had obtained no vested rights in any streets in the city of Rochester. (*H. R. T. Co. v. W. T. & R. Co.*, 135 N. Y. 393; *People ex rel. v. Dolan*, 126 N. Y. 166; *Munn v. Illinois*, 94 U. S. 113; *City of New York v. Herdje*, 68 App. Div. 370; *Buel v. McFadden*, 44 C. C. A. 494.) The plaintiff is not aided in its attempt to invade the streets of Rochester by the claim that it may cost more money to lay its water mains around Rochester than through Rochester. (*L. V. R. R. Co. v. Adams*, 78 App. Div. 427; *Buffalo v. Dudley*, 14 N. Y. 336.) The charter of the city of Rochester was intended by the legislature to confer, and did confer, upon the city of Rochester the complete control of the streets of the city. That power has not been taken from it by the Transportation Corporations Law. (L. 1899, ch. 481, § 39; *Vil. of Carthage v. Frederick*, 122 N. Y. 268; *Walrath v. Abbott*, 85 Hun, 181; *Cronin v. People*, 82 N. Y. 318; *People ex rel. v. Pratt*, 129 N. Y. 68; *City of Rochester v. West*, 164 N. Y. 513; *A. R. T. Co. v. Hess*, 125 N. Y. 641; *Barhite v. Home Tel. Co.*, 50 App. Div. 25; *City of Rochester v. B. T. Co.*, 52 App. Div. 6; *Vil. of Bolivar v. B. W. Co.*, 62 App. Div. 484.) If section 82 of the Transportation Corporations Law can be construed so as to permit the plaintiff to lay its pipes in the streets of Rochester without the consent of the common council, and the ordinance referred to is not potential to prohibit the laying of such pipes, then the act of March 19, 1903, settles the question. (*People ex rel. v. Butler*, 147 N. Y. 164; *Smith v. People*, 47 N. Y. 330; *Riggs v. Palmer*, 115 N. Y. 506; *N. Y. & L. I. B. Co. v. Smith*, 148 N. Y. 540; *Hearst v. Shea*, 156 N. Y. 169; *Hickman v. Pinckney*, 81 N. Y. 211; *People ex rel. v. G. & S. T. Co.*, 98 N. Y. 67; *People ex rel. v. Superior Court of Buffalo*, 30 N. Y. S. R. 704; *Mongeon v. People*, 2 T. & C. 128; *S. P. R. Co. v. Russell*, 7 N. Y. S. R. 595.) The water company secured no right to furnish water in the city by virtue of the alleged grant from the New York Central railroad. (*A. N. R. R. Co. v. Brownell*, 24 N. Y. 345; *B. T. R. R. Co. v. H. V. R. R.*

Co., 76 App. Div. 184; *Quackenbush v. G. Ins. Co.*, 77 App. Div. 168.) The Transportation Corporations Law has not taken away from the city of Rochester its police power. (*Jones v. Foster*, 43 App. Div. 35; *Village of Carthage v. Frederick*, 122 N. Y. 268; *People v. Squiers*, 107 N. Y. 606; *W. U. T. Co. v. Mayor, etc.*, 3 L. R. A. 453; *W. U. T. Co. v. Atty.-Gen.*, 125 U. S. 548; *State of Louisiana v. Schlemmer*, 10 L. R. A. 135; *State v. Parish of Orleans*, 39 La. Ann. 138; *Stone v. Mississippi*, 101 U. S. 817; *Stein v. Stape*, 27 La. 123; *People v. G. M. L. Ins. Co.*, 91 N. Y. 174.) There is an express prohibition in the Transportation Law itself against any corporation organized under that law laying pipe lines through cities without the consent of the common council. (*Crocker v. Whitney*, 71 N. Y. 161; *People v. U. Ins. Co.*, 15 Johns. 383.)

Albert H. Harris for respondent. The plaintiff has the right to lay its water mains through the city of Rochester on the route which it has adopted and secured without asking the defendant's permission. (Thomp. on Highways, 24; *Dygart v. Schenck*, 23 Wend. 446; 3 Kent's Comm. 557; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; *Eels v. A. T. Co.*, 143 N. Y. 133; *Palmer v. L. E. Co.*, 158 N. Y. 231; *People ex rel. v. Priest*, 75 App. Div. 131; *Town of Clay v. Hart*, 25 Misc. Rep. 114; *Starr v. Railroad*, 4 Zab. 572; *Jersey City v. Hudson*, 2 Beas. 420; *Perley v. Chandler*, 6 Mass. 492; *Allen v. Boston*, 159 Mass. 324.) The plaintiff's rights are not affected by the amendments to section 157 of the charter of the city of Rochester. (*S. R. T. Co. v. Mayor, etc.*, 128 N. Y. 510; *Super. v. Brogden*, 112 U. S. 261; *Robinson v. Goners*, 138 N. Y. 425; *Dartmouth College v. Woodward*, 4 Wheat. 519; *People v. O'Brien*, 111 N. Y. 1; *Indianapolis v. C. G. T. Co.*, 140 Ind. 107; *Wheat v. Alexandria*, 88 Va. 742; *People ex rel. v. Deehan*, 153 N. Y. 528; *W. U. T. Co. v. City of Syracuse*, 24 Misc. Rep. 338; *Milhau v. Sharp*, 27 N. Y. 611; *S. R. T. Co. v. Mayor, etc.* 128 N. Y. 510; *R. II. & L. R. R. Co. v. N. Y., L. E. & W.*

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R. R. Co., 110 N. Y. 128.) The amendments should be given prospective effect, and only against those not having existing rights. (*New York & Oswego R. R. Co. v. Van Horn*, 57 N. Y. 473.) The grant of an easement from the New York Central and Hudson River Railroad Company to the plaintiff was valid. (*G. T. R. R. Co. v. Richardson*, 91 U. S. 454; *Matter of N. Y. C. R. R. Co. v. M. G. L. Co.*, 63 N. Y. 326; *Guerney v. M. E. Co.*, 30 L. R. A. 534; *Railroad Company v. Waltern*, 17 Ill. App. 582; *W. U. T. Co. v. Rich*, 19 Kans. 517; *Pierce v. Railroad*, 141 Mass. 481; Lewis on Eminent Domain [2d ed.], § 584; *Roby v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 176.)

HAIGHT, J. This action was brought to restrain the city of Rochester, its officers, agents and servants, from interfering with, or preventing the plaintiff from, laying its water pipes or mains across certain streets of the city.

The plaintiff is a domestic corporation organized under the Transportation Corporations Law, chapter 566, Laws of 1890, as amended by chapter 617, Laws of 1892, for the purpose of supplying water to the villages of Brighton and Fairport and the towns of Greece, Gates and Brighton, in the county of Monroe. The trustees of the villages and the officers of the towns have, under due form of law, executed in writing permits, authorizing the formation of the plaintiff as a corporation, for the purpose of supplying their respective villages and towns with water, which were duly acknowledged and annexed to the certificate of incorporation and filed therewith. The plaintiff, after perfecting its organization and paying the charge therefor imposed by the statute, determined to take its supply of water from Lake Ontario at a point near Rigney's Bluff westerly from the point at which the Genesee river empties into the lake, and to lay its pipes therefrom southerly through the towns of Greece and Gates to the city of Rochester, and thence through the city to the town of Brighton, and so on easterly to the village of Fairport. It caused a map to be made of the lands intended

to be taken or entered upon in the route which it had adopted, duly signed by the officers of the company and filed in the office of the clerk of the county, as required by section 83 of the Transportation Corporations Law. It then procured its right of way through the towns of Greece and Gates to the city of Rochester, and entered into a contract with the New York Central & Hudson River Railroad Company by which it was given the right to lay its mains upon the company's right of way, through the city of Rochester and the town of Brighton to the village of Fairport. It entered into a contract with another corporation to construct its plant and lay its pipes, and has made agreements to supply water to a number of manufacturing establishments, including railroad repair shops, in the towns outside of the city of Rochester, and to supply the New York Central & Hudson River Railroad Company with the water that it required in the city of Rochester, and at its stations east between the city and Fairport. After which it commenced the laying of its pipes and undertook to dig trenches therefor across one or more of the streets of the city upon the right of way of the railroad company, and was prevented from so doing by the officers of the city, acting through its police department, and thereupon this action was brought to restrain such interference.

The trial court has found as a fact that there was a legitimate demand for water in the towns and villages specified; and that it was necessary for the plaintiff, in order to carry out the purposes of its incorporation and to fulfill the contracts which it had made and assumed, to lay its water mains along the route which it had adopted through the city of Rochester; and that it had acquired an easement to cross the intersecting streets. At the request of the defendant the court found, "That it is a physical possibility to carry water from Lake Ontario to the towns of Greece and Gates on the south and west of Rochester, and to the town of Brighton and the villages of Brighton and Fairport on the east of Rochester, without laying any pipes within any portion of the territory of the city of Rochester, but that to supply the said territory east of

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Rochester would require pipes to be laid through the town of Irondequoit, in which the plaintiff has neither sought nor obtained any permit from the local authorities, and has acquired no right of way, and the cost of such construction would be materially greater." The town of Greece lies between the lake and the city of Rochester. The town of Gates is west of the city, and that of Brighton is east of the city. It, therefore, is necessary in laying a main from the town of Gates to the town of Brighton and to the villages on the east of the city, to pass through the city of Rochester, or to go around the city through the town of Irondequoit which would involve the laying of the pipes for a much greater distance, and consequently cause a considerable increase in the cost of the construction.

Section eighty-two of the statute under which the plaintiff was incorporated provides as follows: "Every such corporation shall have the following additional powers:

"1. To lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public place of any city, town or village in which it has obtained the permit required by section eighty of this article.

"2. To lay their water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained.

"3. To cause such examinations and surveys for its proposed water works to be made as may be necessary to determine the proper location thereof, and for such purpose by its officers, agents or servants to enter upon any lands or waters in the city, town or village where organized, or, in any adjoining city, town or village for the purpose of making such examinations or surveys, subject to liability for all damages done."

The first subdivision of this statute gives to water companies the right to lay and maintain their pipes and hydrants in any street, highway or public place of the city, town or village in which it has obtained a permit to supply its inhabitants with water. The second subdivision gives a like power to the

company as to its pipes in an adjoining city, town or village. It is upon this latter subdivision of the statute that the plaintiff bases its claim of right to run its pipes through the city of Rochester. The city, as we have seen, adjoins the town of Gates on the west and the town of Brighton on the east. It owns and operates a municipal water plant, by which it supplies itself and its inhabitants with water. It also has for many years supplied the New York Central & Hudson River Railroad Company with water within the city at an annual rental of from \$18,000 to \$20,000 per year. The city, therefore, does not require water from the plaintiff corporation, and objects to its occupying any portion of the streets with its pipes. The purpose of this provision of the statute is manifest. The legislature did not propose that one municipality, which happened to be more favorably situated, should have the power to prevent another and adjoining municipality from obtaining water, where it becomes necessary to pass through the territory of such adjoining municipality to reach the source of supply. This was settled in the case of *Village of Pelham Manor v. New Rochelle Water Company* (143 N. Y. 532), in which case the court went to the extent of holding that a water company had the right to lay its water pipes in the streets of an adjoining town or village, whenever it was necessary to effectually and properly execute the purpose for which it was created, even though the point in the adjoining town where the pipes were laid did not intervene between the source of supply and the place of distribution. A vigorous assault has been made by the counsel for the appellant upon the wisdom of this statute. While we have no power to review the legislative discretion, it may not be out of place to here make some suggestion with reference to this particular provision. We fully recognize the justice of the provision which permits the laying of water pipes through an adjoining municipality, and thus preventing such municipality from depriving its neighbors from receiving a supply of water, where such municipality happens to intervene between the source of supply and the place of distribution.

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This power, as it was originally granted, was limited to towns and villages, but under the provision of chapter 617 of the Laws of 1892, the right to lay pipes through the streets, avenues and public places, was extended to cities. This provision was adopted doubtless for the reason that it was found that the compelling of a water company to lay its mains around the territory of a city many miles in extent, might involve such expense as to operate as a practical prohibition to the supplying of water to villages which happen to be situated so that the city intervenes between them and the source of water supply. We think, however, that the legislature might properly have placed some restriction upon the use of the streets in cities, and possibly in villages, that should be made by water companies; that the city or village authorities should be given some voice as to the streets that should be used, and the place and manner in which the pipes should be laid therein; and that it should not be left entirely to the judgment and discretion of the officers of the water company to place its pipes wherever they please, without regard to the wishes or reasons of the officers of the city who may desire to have them placed elsewhere. There is, however, no complaint with reference to the location of the company's line in this case, provided it has the right to lay its pipes through the city. The line selected upon the right of way of the New York Central & Hudson River Railroad Company relieves the city from having the pipes laid lengthwise through its streets, for it only crosses the streets that are crossed by the railroad tracks.

The trial court has awarded judgment to the effect that the plaintiff has acquired the right to lay and maintain its water mains through the city of Rochester upon the strip of land owned by the New York Central & Hudson River Railroad Company; and that the city, its officers, agents and servants, be enjoined from interfering with the plaintiff in laying its water mains across the streets of the city. In awarding such judgment the court has very properly imposed certain conditions upon the plaintiff, regulating the manner

in which it should do its work ; providing for the guarding of trenches ; the restoring of pavements and streets in which trenches have been dug ; to save the city harmless from liability, and to give the commissioner of public works of the city twenty-four hours' notice before commencing the work of excavating in any of the streets. The representatives of the city have not suggested that further restrictions should be imposed, and, indeed, we do not understand them as complaining of the judgment, except in so far as it holds that the plaintiff has acquired the right to lay its pipes into or through the territory of the city.

We are thus brought to a consideration of the defenses interposed by the defendant. The city in its answer has set out section forty of its charter, as finally amended by chapter twenty-eight of the Laws of 1894, which gives the common council of the city the power to enact ordinances for the following purposes: "To regulate and prevent the use and encumbering of streets; * * * to regulate the opening of street surfaces and connections with sewers, and the laying of gas, water pipes and mains and sewer connections." It further alleges that on or about the 11th day of May, 1897, the common council of the city duly enacted an ordinance relating to streets, which contained the following: "Section 1. No person shall injure any pavement, sidewalk, crosswalk or sewer, nor dig any area, sewer, lateral sewer or other excavation in any public street, nor remove any earth or stone therefrom, within the city of Rochester, without permission in writing from the executive board, and under such conditions as said board may impose, and the executive board may order any sewer or excavation constructed contrary to the provisions of this section to be filled up or altered at the expense of the owner." Further provisions of the ordinances make a violation punishable by a fine not exceeding \$150, or to imprisonment not exceeding one hundred and fifty days, or to both such fine and imprisonment. The answer further alleges that the city of Rochester is a city of the second class, and that under section 483 of chapter 182 of the Laws of

1898, entitled "An act for the government of cities of the second class," it is provided that "nothing contained in this act should be construed to repeal any statute of the state or ordinance of the city, * * * not inconsistent with the provisions of this act." It is also alleged that by section 109 of the latter act the commissioner of public works "has cognizance, direction and control of the construction, alteration, repair, care, paving, flagging, lighting and improving streets, ways and sidewalks;" that under section 142 of the act the commissioner of public works has the jurisdiction of commissioners of highways in towns; and under section 110 he is required to appoint a superintendent of water works, to see that the city has an abundant supply of wholesome water for public and private use.

To our minds the provision of the charter of the city of Rochester, giving to the common council the power to enact ordinances upon various subjects, does not affect the questions involved in this case. The common council has enacted an ordinance to regulate and prevent the use and incumbering of streets. This undoubtedly has reference to the use and incumbering of streets upon the surface, and not especially to the use made of the soil underneath the street. That was doubtless left to the other provision which regulates the opening of street surfaces for the laying of gas and water pipes, and the making of sewer connections. This ordinance was doubtless framed to regulate the laying of the water mains of the city's plant and the connections to be made therewith by the abutting owners on the streets. It is claimed that it had reference to the water mains of water companies organized under the statute to which we have called attention; but the ordinance was adopted May 11th, 1897, after the passage of the Transportation Corporations Law. To give it the force claimed would necessitate the holding that it was the intention of the legislature to vest in the common council of the city of Rochester the power by ordinance to repeal or amend a general statute of the state. This certainly could not have been intended, for the power delegated to enact ordinances has

always been limited to such as were not in conflict with existing laws ; so that if the ordinance is to be construed as a prohibition against making any excavations in a public street for the purpose of laying water pipes by the plaintiff herein then it is in conflict with the provisions of the general statute to which we have referred, which expressly gives such power in adjoining municipalities. As to the provisions of the charter of cities of the second class, which continue in force statutes and ordinances which are not inconsistent with its provisions, they relate to those ordinances which are valid and are not in conflict with existing statutes. While the commissioner of public works is given the power of commissioners of highways and the power to appoint a superintendent of water works whose duty it is to see that the city is supplied with wholesome water for public and private use, we do not understand that it gives him any power to prohibit the laying of pipes under general laws or control over the water of the plaintiff corporation so long as it is only passing through the city in the mains of the company for use elsewhere. If an attempt is made to distribute the water within the city then the superintendent may become interested in ascertaining whether it is pure and wholesome or is contaminated.

The defendant has further alleged in its answer that by chapter 59 of the Laws of 1903, section 157 of the city charter was amended so as to substitute the commissioner of public works for the executive board, and then by adding the following: "No other person or corporation shall enter upon or excavate any road, street, highway or public place in the city of Rochester, for the purpose of laying down pipes for the conveyance of water, without the permission of the common council." And this section has been again amended since the decision in this case was made by chapter 553 of the Laws of 1903, in which there was added the following:

"Section 1. Which body may deny any such application in its discretion. No person or corporation shall furnish or distribute water within said city of Rochester from pipes, mains or conduits except under a franchise granted by an ordinance

passed by a three-fourths vote of all of the members of the common council, approved by the board of estimate and apportionment and providing for a disposition of such franchise for an adequate consideration for a period not exceeding twenty-five years and upon such terms and conditions as said common council may impose. Section 2. Any right, license or permission to any person or corporation, other than the city of Rochester, to enter upon and lay pipes for the conveyance of water in the public streets and highways of the city of Rochester, or to furnish and distribute water within said city, accruing, accrued or acquired under and pursuant to any previous act of the legislature, or part of such act, is hereby repealed and revoked. Section 3. All acts and parts of acts inconsistent with this act are hereby repealed." Section 157 of the city charter had reference to the power of the executive board over the extension of the water mains of the city, their repair and maintenance. The duties of the executive board were transferred to that of the commissioner of public works, and he was, therefore, given the power which the board had previously possessed over the streets and the extension of the water mains therein. The first amendment prevents any other person or corporation from entering upon, excavating or laying down pipes in the streets, without the permission of the common council. It may be that manufacturing corporations and abutting owners upon streets who desire to have connections made with the water mains of the city in the future must obtain the permission of the common council to open the streets and make connections with its city water system; and that the provisions of the amendment should be construed as applying to the water works plant of the city, and, therefore, not in conflict with the general law. But as to the last amendment, made after the trial and decision of this case, we think no such construction is permissible. It was evidently intended to meet the circumstances of this case and to prevent the plaintiff from laying its pipes within the territory of the city. It remains, therefore, to be determined whether this legislation can be given force and effect. As we

have seen, the plaintiff corporation had been perfected and it had paid the state the taxes imposed therefor. It had caused surveys to be made and a map filed, locating its route, and had entered into a contract for the construction of its plant, including the laying of its pipes. It had acquired its right of way and had entered into contracts for the supplying of water, in accordance with its charter. It had expended money and incurred obligations. All this had taken place before the legislation of 1903. The plaintiff, in incurring these obligations and in making these expenditures, had the right to rely upon the faith of the franchise which it had acquired, under which it had the right to supply the localities with water. We think these rights had become vested and were property within the meaning of the Constitution, which prohibits the deprivation of a person of property without due process of law. (*People v. O'Brien*, 111 N. Y. 1.)

As we have seen, under the general statute, the right was given to the water company to lay its pipes in the highway of an adjoining city, town or village. No consent of the municipal authority was required. While we have made suggestions with reference to this legislation, we think that the whole matter is subject to legislative control. The care, control and management of the highways at common law were vested in the sovereign. In this state the sovereign power is with the people, as represented in their legislature. The sovereign power over highways may be delegated to municipalities to such an extent as the legislature may deem advisable; and when the grant by the government is made to a municipality of a portion of its sovereign power, it is to be deemed a sufficient consideration for an implied contract on the part of the municipality to perform the duties which the charter imposes, and the contract so made with the sovereign power inures to the benefit of every individual interested in its performance. (*Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158.) The management and control of highways, given by the state to cities and villages, is still subject to such statutes as the legislature shall adopt with reference thereto.

And when, therefore, the legislature sees fit to sanction their use for the transportation of water for the benefit of the people of a municipality, it is a public use which the legislature has the power to authorize without the consent of the municipality.

It is suggested that it was not necessary that the plaintiff should run its line of pipe through the city of Rochester; that it could have located its line through and around the city through the town of Irondequoit. We have not been favored with a finding as to the amount of additional expense that would be involved in the making of this circuit of the city, and we consequently cannot determine as to whether it would be so great as to render the undertaking financially impossible and thus operate to deprive the villages named of an opportunity to procure water. We think a sufficient answer to this suggestion lies in the fact that the town of Irondequoit does not directly intervene between the towns named in the certificate of incorporation which seek the supply of water, or furnish the direct, natural and feasible route between the same.

The remaining suggestion, coming from the city, is to the effect that the plaintiff corporation may become a competitor of the city. This grows out of the fact appearing in the record that the city of Rochester owns and operates a municipal water plant which supplies water to its inhabitants for domestic and manufacturing purposes; that the plant cost eleven millions of dollars, and that there are three millions of dollars in municipal bonds outstanding; that for many years the New York Central & Hudson River Railroad Company has been supplied with water within the city from the municipal plant, it paying therefor from \$18,000 to \$20,000 per annum; that the rate charged the company by the city has been fourteen cents per thousand gallons; and that the company has entered into a contract with the plaintiff corporation to supply it with water at about one-half of that rate. This fact doubtless furnishes the chief reason on the part of the city for opposing the laying of the company's lines through the city on the right of way it has obtained. We do not at this time

deem it necessary to engage in any discussion of the merits of municipal ownership, or to determine whether the establishing of a municipal plant operates to give the city an exclusive right to supply its inhabitants with water. Under the statute, as we have seen, the company has the right to run its mains through the city, in order to comply with the purposes of its grant. When it attempts to supply water to the inhabitants of the city within its territorial limits, its power to do so may then be questioned by the municipality, and the courts may then be called upon to determine the extent of its powers in that regard.

The New York Central & Hudson River Railroad Company is not here opposing this judgment. The city of Rochester is not interested in the question as to whether the plaintiff has obtained from the railroad company a valid right of way along the company's lands. It, therefore, is not in a position to call upon the courts to determine the validity of such title.

The judgment should be affirmed, with costs.

BARTLETT, J. (dissenting). In this action the plaintiff seeks a permanent injunction against the defendant and is consequently bound to show an entry into court with clean hands and a clear right to the relief demanded. The validity of plaintiff's contracts with other corporations is involved, but only for the purposes of this action, and the judgment which may be entered will necessarily be limited in its operation to the rights of parties before the court.

The plaintiff having set the court in motion cannot be heard to complain if the issues involve a wider range than it originally contemplated.

The plaintiff is a water works corporation, organized under the Transportation Corporations Law in December, 1902, naming in its certificate two villages and three towns in the county of Monroe which it proposed to supply with water. A portion of the territory named adjoins the defendant, the city of Rochester, on the east and a portion adjoins it on the

west. The plaintiff intends, according to its certificate, to obtain its supply of water from Lake Ontario, some distance west of the Genesee river, and to lay its mains southerly parallel to the river to the west line of the city of Rochester, thence through the city to the territory on the east.

The trial court found that the plaintiff, before the commencement of this action, obtained from the state of New York a franchise giving to it the right to lay and maintain its water mains through the city of Rochester, upon the route adopted by it, to the exercise and enjoyment of which the consent of the city of Rochester is not required; that thereafter the plaintiff undertook to lay its mains on the line of its proposed route at two certain streets, but was prevented by defendant exercising force to that end.

The court further finds that the New York Central & Hudson River railroad passes through the city of Rochester, and that the company owns and occupies a continuous strip of land through the city in an easterly and westerly direction, upon which its tracks are laid; that this strip of land is intersected by several streets, some of which cross at grade and some above or below grade; that the land at all of the street crossings is owned by the railroad company, subject to the public user for street purposes.

It is further found that plaintiff acquired an easement in the north six feet of said continuous strip of land, for the purpose of laying and maintaining thereon its water mains, by virtue of two written contracts with the New York Central & Hudson River Railroad Company, by which it agreed to furnish water to the railroad company in large quantities in the city of Rochester and elsewhere, on its right of way, for a term of years; that a like contract to furnish water was made by plaintiff with the Buffalo, Rochester & Pittsburg Railway Company.

It is found that the city of Rochester owns and operates a municipal water plant which supplies water to its inhabitants for domestic and municipal purposes in large quantities; that the cost of this plant was about \$11,000,000, of which

\$3,000,000 are represented by outstanding bonds. The New York Central & Hudson River Railroad Company has been supplied with water by the city of Rochester, paying therefor from \$18,000 to \$20,000 per annum. The Buffalo, Rochester & Pittsburg Railway Company has also paid the city of Rochester a very considerable sum per annum for water.

The plaintiff contends that on the facts found it is, by virtue of the statute and under its contracts with the Central & Hudson, possessed of a legal franchise and route through the city of Rochester on which to lay and maintain its mains. The plaintiff admits that whenever the question is presented it will insist that it can legally furnish water, in the city of Rochester, to the railroad companies with which it has contracted and to such adjoining owners as can be reached without laying its pipes along the streets.

The plaintiff and the courts below have sought to confine the case to the one question of the legality of the route claimed by plaintiff.

It will presently appear that other questions are necessarily involved in passing upon the alleged legality of the route.

1. The first point arises under the provisions of plaintiff's charter; it is authorized to furnish water to two villages and three towns. Its charter does not extend to the city of Rochester, and it has no more right to sell, or furnish, water within the corporate limits of that city than it has in the city of New York.

This point goes to the foundation of the action, for the plaintiff cannot sell or furnish water even to the New York Central & Hudson River Railroad Company within the boundaries of the city of Rochester, and hence its contracts with the said company are *ultra vires* and give it no franchise or vested rights. The plaintiff's right to lay and maintain its mains on the strip of land in question, as between it and the Central & Hudson, rests on its covenant to supply the railroad company with water.

2. While the Central & Hudson could lay water pipes on its right of way to supply itself with water, for that would be a purpose incidental to its charter, it could not sell water

to others, for that would be foreign to its charter. Not having that right itself, it could not confer it upon the plaintiff. It could not by contract enable the plaintiff to do something which the railroad company had no right to do itself.

It is true that a railroad company, needing water for its uses and purposes, may resort to condemnation proceedings to obtain it (Railroad Law, § 7, subd. 4), but this power does not affect the present situation.

In so far as plaintiff rests its claim for equitable relief on its contracts, it asks the protection of a right by injunction that does not exist in law. The contracts relied upon are two in number. One Mingle entered into a contract with the Central & Hudson to furnish it for a term of years with water, which was assigned to plaintiff by Mingle, with the consent of the Central & Hudson, the plaintiff assuming performance. Later, the plaintiff entered into a contract with the Central & Hudson for its right of way, which was granted, subject to the express condition that plaintiff should fully perform the contract to furnish water, so assigned to it by Mingle.

3. The plaintiff further insists that its selected route through the city of Rochester rests not only on its contracts with the Central & Hudson, but on the provisions of the Transportation Corporations Law.

It, therefore, becomes necessary to consider this contention in view of the provisions of various statutes, viz.: The Transportation Corporations Law, as amended; the charter of the city of Rochester and its amendments; the act for the government of cities of the second class, sometimes called the White charter. (Laws 1898, chap. 182.)

The plaintiff contends that, notwithstanding its route is six miles long and crosses twenty-nine streets in the city of Rochester, it can lay its mains thereon and cross said streets without interference from the local authorities. This contention is based on section 82, subd. 2 of the Transportation Corporations Law (Birdseye's R. S. [3d ed.] vol. 3, p. 3764), which authorizes water works corporations "To lay their water pipes in any streets or avenues or public places of an

adjoining city, town or village where such permit has been obtained.”

That is to say, where a corporation has received a permit from a municipality to furnish it with water, it may, in order to reach such municipality, lay its pipes in the streets of an adjoining city, town or village which lies between the water supply and the place to be furnished with water.

As the city of Rochester occupies this position as to certain of the municipalities to be supplied with water by the plaintiff, it is argued that the latter can proceed to locate its route and lay its mains without the permission or interference of the local authorities of the city of Rochester.

While the statute does not declare, in terms, that the local authorities are powerless to regulate or control the route selected in such intervening municipality, the respondent, in support of such a construction, places great reliance on the case of *Village of Pelham Manor v. New Rochelle Water Company* (143 N. Y. 532), decided in November, 1894.

Pelham and New Rochelle are adjoining villages. The claim of the plaintiff was that the defendant had no power to lay pipes in one of its highways without permission of the municipal authorities. Judge O'BRIEN, writing for the court, said: “What the defendant did was to use the road for about five hundred feet in order to connect two of its mains, which terminated in ‘dead ends,’ near the boundary lines of the two towns. * * * So long as the defendant was without power to add to its revenues by furnishing water to the plaintiff, or any of its inhabitants, no great mischief is to be apprehended from any extensive use of the streets by the defendant. But the legislature evidently anticipated that a water company in performance of its functions of supplying the town and every part of it, which granted the permit, with water, might, for some reason, find it necessary to cross the boundary line of an adjoining town and use its highways, not for the purpose of supplying that town, but for the purpose of properly and effectively executing the purpose of its creation. Such necessity has been found in this case as matter

of fact by the trial court, and hence the permission of the municipal authorities who had charge and control of the highways was not necessary."

This case was properly decided on its peculiar facts, as the law stood in 1894, but since then section 81 has been amended, and we have existing, by virtue of this amendment, the very situation, the absence of which controlled the foregoing decision, to wit, where the company claiming the right to lay its pipes in the streets of an intervening town has the power to add to its revenues by supplying it with water.

In 1896 (Laws of 1896, chap. 678) section 81 of the Transportation Corporations Law was amended so as to read:

"§ 81. Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village *through which the conduits or mains of such corporation may pass* * * * with pure and wholesome water at reasonable rates and cost," etc.

It would be an unreasonable construction of this statute, so amended as to compel the corporation passing through an intervening municipality with its pipes to furnish pure water to its authorities and inhabitants, to hold that it could select its route through such municipality without consulting the officers having charge of the streets.

While the right to pass through the streets of the intervening municipality is conferred by this statute, a fair construction leads to the conclusion that the legislature intended that its exercise is subject to the reasonable regulations and control of the local authorities, both as to route and manner of conducting the work.

The court would not be justified in assuming that the legislature intended to allow a water company, in passing through an intervening town where it is compelled to supply water, if required, to select its route as to streets in defiance of the duly constituted authorities, but in the adjoining town, where by permit it is to erect a water system, it is subject to such restrictions as to route and interference with the public streets as the local authorities may deem it proper to impose.

It follows that the provisions of the Transportation Corporations Law, as amended in 1896, do not authorize the plaintiff, even if lawfully within the city limits, to cross the twenty-nine streets in the city of Rochester without submitting to the reasonable supervision and control of the local authorities.

The finding of the trial court that the land at all of these street crossings is owned by the railroad company, subject only to the public use for the purposes of a street, does not help plaintiff, as the local authorities have the power to protect and regulate this public use.

Furthermore, it is a question whether the Central & Hudson could grant an easement to the plaintiff to lay its pipes over the entire strip of six miles, including the land involved in street crossings.

In *Albany Northern Railroad Co. v. Brownell* (24 N. Y. 345, 349) the court said: "Upon this my opinion is, that the railroad companies under the general act do not acquire the same unqualified title and right of disposition, to the real estate taken for the road and paid for according to the act, which individuals have in their lands. The statute declares the effect of the proceedings which it authorizes to be that the company shall be entitled to enter upon, take possession of, and use the said land *for the purposes of its incorporation*, during the continuance of its 'corporate existence;' and it further declares that the land it thus appropriates shall be deemed to be acquired for public use."

It is not contended that the laying of plaintiff's mains over the entire strip was necessary to furnish the railroad company with water; it is admitted a further object was to reach municipalities on the east of defendant. A conveyance by the railroad company with the latter object in view is clearly *ultra vires*.

I have deemed it proper to construe the Transportation Corporations Law as claimed to be applicable to this case, although of the opinion that the charter of the city of Rochester and its amendments, read in connection with the White

charter, already cited, bar the entrance of plaintiff to the city of Rochester.

We have here one of the large cities of the second class, which has, at an expenditure of eleven millions of dollars, created a water system adequate to supplying the municipality and its inhabitants with pure and wholesome water for many years to come.

The question is whether the statutes, under which the city is exercising its governmental functions, permit it to found and maintain a municipal water system in the interests of the public safety and health free from outside competition or interference.

This court has decided that this system of water works was erected for the public benefit and is held for public purposes. (*City of Rochester v. Town of Rush*, 80 N. Y. 302.)

This system of water works was authorized by Laws of 1872, chapter 387, under which were created the original water commissioners of Rochester. The consolidated charter of Rochester, as amended, transferred the control of the water system to the executive board. The amendments of 1890 (Chap. 561, § 150) declare: "The executive board shall have control of the water works of said city, and of the construction of all extensions and additions, improvements and repairs of the same, and of furnishing the water to citizens, and the care and repair of said works, * * * and they may make such rules and regulations and establish such rates for the use of water as they may deem proper."

The act for the government of cities of the second class (White charter, Laws 1898, chap. 182) devolves the construction, maintenance, extension and repair of the city water works upon the commissioner of public works (section 109), and it is also made his duty (section 110), "when a vacancy shall occur, to appoint a superintendent of water works and to see that the city has an abundant supply of wholesome water for public and private use; to devise the plans and sources of water supply; to plan and supervise the distribution of water through the city; to protect it against

contamination ; to prescribe rules and regulations for its use, which, when ratified and approved by the common council, shall have the same force and effect as an ordinance by the common council enacted." The section goes on to give to the commissioner most ample powers in detail.

We have here the legislative intention, clearly expressed, that the city of Rochester is to have full and complete control of its system of water works even to devising the plans and sources of supply, which may be necessary in every city where the increase of population renders the existing supply insufficient.

There is but one fair and workable construction to be given these charters, and that is they make the municipal water system exclusive and free from all outside competition or interference.

If it should be held that these charters, when inconsistent with, are subject to the provisions of the Transportation Corporations Law, and if the judgment appealed from is affirmed, the right and obligation of plaintiff to furnish water to the authorities and inhabitants of Rochester instantly spring into existence. It thus becomes evident that the real question is not solely whether, under section 82 of the Transportation Corporations Law, the plaintiff has the right to pass through the intervening municipality of Rochester, but is the much broader question whether, under the amendment of section 81 of the above law, as already pointed out, the plaintiff can gain a foothold in the city of Rochester which will enable it to become a competitor of the municipal water system, notwithstanding the charter provisions already quoted and other stringent enactments contained therein, and in the ordinances as to the control of the water system and the public streets, which cannot, for lack of space, be quoted here in full.

The question, briefly stated, that dominates this case is, can the plaintiff, under any circumstances, furnish water to the authorities or inhabitants of the city of Rochester? I answer no, unless the city of Rochester permits it.

The charter of the city of Rochester and its amendments

constitute a special act, and are not repealed by the Transportation Corporations Law in the absence of an express or necessarily implied statement to that effect.

The White charter is special in nature as to the Transportation Corporations Law for it is confined to four cities. Independent of that, however, it is subsequent in date to the Transportation Corporations Law and, hence, is superior to the provisions of the latter when there is a necessary conflict.

4. There is a reason, independent of statutory enactments, why the city of Rochester should have exclusive and absolute control of its water system. It is necessarily vested with the police power as a part of its governmental functions.

The law of paramount necessity is involved and the maintenance of the municipal water system, untrammelled by competition or interference, is essential for sanitary purposes, the extinguishment of fires and the conservation of the public health by furnishing an abundant supply of pure and wholesome water for general consumption.

Chief Justice REDFIELD said: "The police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State." (*Sharp v. Rutland & B. R. R. Co.*, 27 Vt. 149.)

A city or other political division of the state acts in a dual capacity; in business matters it is treated as a private person in suing and being sued, but when exercising the delegated sovereign power of the state it is judged by the same legal standard as the state itself. (*Maximilian v. Mayor, etc., of New York*, 62 N. Y. 160; *Hughes v. County of Monroe*, 147 N. Y. 49; *Missano v. Mayor, etc., of New York*, 160 N. Y. 123.)

In *People ex rel. N. Y. Electric Lines Co. v. Squire* (107 N. Y. 593, 606), RUGER, Ch. J., in discussing the police power, said: "The right to exercise this power cannot be alienated, surrendered or abridged by the legislature by any grant, contract or delegation whatsoever, because it constitutes the exer-

cise of a governmental function, without which it would become powerless to protect the rights which it was specially designed to accomplish."

The police power is as broad and plenary as the taxing power. (*Kidd v. Pearson*, 128 U. S. 1.)

This court has held, as already pointed out, that the Rochester water works system is to be regarded as created for the public benefit, held for public purposes, and not subject to taxation. (*City of Rochester v. Town of Rush*, 80 N. Y. 302.) To subject this system to competition or interference would be to weaken and possibly destroy it.

5. In arriving at the conclusion that the plaintiff cannot lawfully extend its route through the city of Rochester, I have not adverted to the charter amendments of 1903, as I am of opinion they are not absolutely essential in reaching that result. The legislature of 1903 twice amended the charter of the city of Rochester, section 157 (Laws 1903, chap. 59; chap. 553). This section is headed: "Power over streets, *et cetera*, to extend water works." The first amendment added these words to the section: "No other person or corporation shall enter upon or excavate any road, street, highway or public place in the city of Rochester, for the purpose of laying down pipes for the conveyance of water, without the permission of the common council." This provision limited the exercise of power to the commissioner of public works. The amendment became operative March 19th, 1903.

The motion for a preliminary injunction herein was granted March 18th, 1903, but the order was not entered until two days later. The appellant claims the legislation precedes the injunction. The order entered related back to the day the motion was granted in writing, with a direction that the order be settled on two days' notice. (*Robinson v. Govers*, 138 N. Y. 425.) We do not regard this point as material.

The trial of this action, which resulted in the judgment making the preliminary injunction permanent, did not take place until the following April. This judgment was entered notwithstanding the declaration of the legislature that no other

person than the commissioner of public works could lay pipes in the streets for conveying water without the permission of the common council.

The force of this legislation was sought to be limited by the trial court in its opinion, but the application of a familiar canon of construction disposes of the matter, to the effect that in construing a statute resort may be had to the circumstances under which and the purposes for which a statute is passed. (*People ex rel. Onondaga County Savings Bank v. Butler*, 147 N. Y. 164; *Smith v. People*, 47 N. Y. 330.)

It was shown that the object of this legislation was to prevent the plaintiff extending its route through the city of Rochester, and the governor discloses the fact in his memorandum handed down when signing the bill.

The plaintiff was possessed of no franchise or vested rights authorizing it to extend its route through the city of Rochester, and the trial court should have heeded this latest expression of the legislative will.

The second amendment (Laws 1903, chap. 553) did not become operative until May 12th, 1903, and need not be considered at this time, although it is a more emphatic announcement of the legislative intention to make the water works system of the defendant exclusive.

6. Our attention is called to the fact that the trial court sought, in its judgment, to protect the defendant by stringent provisions as to the manner in which plaintiff should proceed with its work.

The plaintiff's contention was that it is authorized by law to lay out its route through the city of Rochester, and the local officials had no authority to interfere in any way. The defendant's position was that the plaintiff had acquired no franchise or vested rights in the premises and could not enter the city of Rochester without its permission. There is no middle ground lying between these two positions; the plaintiff could extend its route through the city of Rochester undisturbed, or it was powerless to do so unless the defendant gave its permission. The provisions in the judgment to which ref-

erence has been made were unauthorized, as the rights of the parties rest upon legislative enactment.

7. The trial court found (finding XII) that it was necessary for plaintiff to pass through the city of Rochester "in order to carry out the purposes of its incorporation and fulfill the contracts which it has made and assumed," etc. This finding must be read, however, with another (finding XX), to the effect that it is a physical possibility to reach the territory on the east of the city of Rochester without laying any pipes within its territory, but the cost of construction would be materially greater.

8. It would seem quite impossible to read this record without reaching the conclusion that the real object of this plaintiff is to accomplish by indirection that which it could not secure otherwise, to wit, an entrance into the city of Rochester, for the purpose of ultimately serving that city and its inhabitants with water as a competitor of the existing municipal water works system.

I have previously pointed out that the plaintiff admits that whenever the question is presented (and we hold that it is presented now) it will insist that it can legally furnish water in the city of Rochester to the railroad companies, with which it has contracted, and to such adjoining owners as can be reached, without laying its pipes along the streets.

I have also called attention to the fact that if this route can be extended through the city of Rochester, under the provisions of the Transportation Corporations Law, as contended, then the amendment of section 81 in 1896 would enable the plaintiff to furnish water to the defendant and its inhabitants, subject only to the reasonable regulations and control of the local authorities.

The learned Appellate Division in its opinion says: "It is obvious, however, that the incidental privileges of supplying water to the Central Railroad Company and contiguous property owners within the city of Rochester was one of the chief inducements to the organization of the plaintiff, although that intention was not embodied in its certificate of incorporation

filed with the Secretary of State, and upon which its organization tax was accepted by the State."

The learned court, notwithstanding its expressed conviction that plaintiff was impelled by ulterior motives, failed to apprehend the full legal results of affirming the judgment of the Trial Term.

It may be further stated that a corporation having a capital stock of \$2,500,000, and the power to issue bonds for a large sum, would not be justified in marketing such an amount of securities, if its real object was only to furnish water to the rural localities named in the certificate, with their small aggregate population.

The fact that the plaintiff has selected the corporate name of the Rochester & Lake Ontario Water Company is not without significance as bearing upon plaintiff's ulterior designs.

9. I have to say, in conclusion, that while there are many objections to the judgment below, the primary and controlling one is that the plaintiff sought an injunction to promote an illegal purpose, and, hence, its prayer for relief should have been denied.

The judgment of the Appellate Division and the Special Term should be reversed, with costs.

PARKER, Ch. J., GRAY and O'BRIEN, JJ., concur with HAIGHT, J.; MARTIN and VANN, JJ., concur with BARTLETT, J.
Judgment affirmed.

THE TRENTON POTTERIES COMPANY, Appellant, v. TITLE
GUARANTEE AND TRUST COMPANY, Respondent.

1. TITLE INSURANCE — WHAT IS INSURED BY POLICY OF. A policy of title insurance undertaking to insure the holder thereof against all loss and damage, not exceeding a specified sum, which the insured shall sustain by reason of any defect or defects of title, affecting the title of the property insured thereby and the interest of the insured therein, or by reason of unmarketability of the title of the insured to or in the premises, or by reason of liens or incumbrances charging the same at the date of the policy, is a contract designed to save the insured harmless from any loss through defects, liens or incumbrances that may affect or burden his title

when he takes it, and from the very nature of the contract it usually bears the same date as the deed of the title which it purports to insure, and if, in any case, there is a discrepancy between such dates it must be due to some exceptional circumstance which should be noted in the contract.

2. REFORMATION OF POLICY — WHEN INSURER NOT LIABLE FOR ASSESSMENT LEVIED ON PROPERTY AFTER CONVEYANCE TO INSURED, BUT BEFORE DATE OF ISSUANCE OF POLICY. Where a policy of title insurance covering five separate pieces of property was not issued at the time the deeds of four of the parcels were delivered and accepted, but its issuance was postponed until after the title to the fifth parcel was perfected, evidence of the facts and circumstances under which the contract of insurance was made showing that there was no purpose on the part of either of the parties to have any of the titles insured beyond the moment when they became the property of the insured; that the issuance of a single policy after all the titles were perfected was agreed upon as a matter of convenience with no thought of changing the liability of the insurer from what it would have been if a policy upon the first four titles had been issued when the conveyances thereof were made, and that there was no mistake as to the actual terms of the agreement expressed in the policy, but that in reducing it to writing the real date as to a part thereof was inadvertently omitted, will justify the trial court in reforming the policy so as to make it conform to the actual agreement of the parties; and the insured cannot maintain an action to compel the insurer to reimburse the insured for the amount paid upon an assessment for a street opening, which became a lien upon one of the four parcels three months after the insured had taken title thereto and seven months before the policy was issued.

3. EVIDENCE — TESTIMONY OF EXPERTS NOT COMPETENT TO SUPPORT CONCLUSION THAT THE POLICY SHOULD HAVE BEEN DIFFERENT IN FORM. Testimony of experts in title insurance as to what they would have done, or what ought to have been done, in the issuance of the policy in question, and as to the custom of title insurance companies in such cases, is not admissible to support the legal conclusion that the policy should have been different in form.

Trenton Potteries Co. v. Title Guarantee & Trust Co., 68 App. Div. 636, affirmed.

(Argued May 15, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 13, 1902, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Howard R. Bayne for appellant. The learned trial judge erred in overruling plaintiff's objections to answers that violate the rule of evidence which requires a witness to state facts or conversations and not give conclusions or opinions upon the question which the jury is to determine. (*Turner v. City of Newburg*, 109 N. Y. 301; *Wanamaker v. Megraw*, 168 N. Y. 132; *Ives v. Ellis*, 169 N. Y. 85; *Bank of State of N. Y. v. S. Nat. Bank*, 170 N. Y. 1; *Jefferson v. N. Y. El. R. R. Co.*, 132 N. Y. 483; *Foot v. Beecher*, 78 N. Y. 155; *Hall v. U. S. Radiator Co.*, 76 App. Div. 504.) There is no evidence that a mutual mistake between plaintiff and defendant was made. (*Allison Bros. Co. v. Allison*, 144 N. Y. 31; *Nevins v. Dunlap*, 33 N. Y. 680; *Curtis v. Albee*, 167 N. Y. 364.)

George Coghill and *John L. Cadwalader* for respondent. Upon the facts as now shown by the evidence the court might, without the necessity of reforming the policy, construe it in the light of the circumstances surrounding the contract for its issuance and occasioning delay in its delivery, as limiting the defendant's liability for liens to those only which arose upon the several properties prior to the time they were respectively conveyed. (*Draper v. Snow*, 20 N. Y. 331; *Kincaid v. Archibald*, 73 N. Y. 189; *Barlow v. S. N. Nat. Bank*, 63 N. Y. 399, 402; *S. T. S. B. Co. v. Jenks*, 19 App. Div. 314.) The rulings of the trial court upon the admissibility of evidence were correct. (*De St. Laurent v. Slater*, 23 App. Div. 70; *Carroll v. N. Y. El. R. R. Co.*, 14 App. Div. 278; 162 N. Y. 603; *Smith v. Wetmore*, 24 Misc. Rep. 225.)

WERNER, J. This action is brought to recover upon a policy of title insurance, the amount of an assessment which became a lien upon the property of the plaintiff, after it had taken title thereto and gone into possession thereof, but before the date of the policy. It appears that the plaintiff, a New Jersey corporation, was formed for the purpose of taking over the property and business of five pottery plants in Tren-

ton, New Jersey, known as the Empire, Crescent, Equitable, Delaware and Enterprise, and it employed the defendant to search the titles and to insure them. Early in July, 1892, the titles to four of these plants were ready for transfer, but the title to the "Empire" plant was incumbered by certain infants' interests that could not be conveyed without judicial sanction in proceedings instituted for that purpose. This complication led to an interview between a representative of the plaintiff and another of the defendant, in which it was decided to have a single policy to cover all of the properties, and to defer the issuance thereof until the "Empire" title could be perfected. At this interview the deeds conveying to the plaintiff the Crescent, Equitable, Delaware and Enterprise potteries were delivered to defendant's representative and by him recorded, and thereupon the plaintiff went into possession of these four plants. The defects in the "Empire" title were removed and the conveyance of that property was made on April 19th, 1893, the deed being recorded April 24th, 1893, on which date the policy in suit was issued.

On the 12th of October, 1892, an assessment for a street opening became a lien on the "Crescent" property. This was three months after the plaintiff had taken title thereto, and seven months before the defendant issued its policy. The plaintiff, having paid the assessment, called upon the defendant for reimbursement, which was refused, and this action was brought.

There have been two trials. Upon the first trial it was held that the plaintiff could not recover because it was the owner of the property upon which the assessment was made at the time it became a lien. The judgment entered upon that decision was reversed at the Appellate Division upon the ground that it could not be held as matter of law that a policy dated subsequent to the assessment, and which in terms purported to insure against liens and incumbrances charging the property at the date of the policy, was intended to cover only such liens and incumbrances as existed when the plaintiff took

title. Upon the second trial the defendant was permitted to introduce oral evidence in support of its allegation, that by inadvertence and mistake the policy was dated April 24th, 1893, when in fact it should have been dated July 1st, 1892, as to the four properties conveyed on the latter date. The learned trial court held that the allegation of mistake was abundantly supported by the evidence, and the judgment in favor of defendant, entered upon that decision, has been unanimously affirmed by the learned Appellate Division.

The learned counsel for the appellant, realizing the limitations imposed upon him by the unanimous affirmance, takes the position that if the incompetent evidence received over his objections was expunged from the record it would be barren of proof tending to show inadvertence or mistake in the framing of the contract of insurance. This contention is amply justified so far as it relates to the evidence of so-called experts in title insurance who were permitted to give their opinions as to what they would have done or what ought to have been done in the issuance of such a policy under the conditions above described. There is so much of that kind of incompetent evidence received under the objections and exceptions of plaintiff's counsel that we cannot attempt to reproduce it here, and we shall only give two or three specimen questions and answers to illustrate how far afield the defense was permitted to go in its attempt to secure a reformation of the contract on the ground of inadvertence and mistake.

One Van Buskirk, a lawyer and a director of the defendant, was asked: "If you had issued a policy of insurance at or about that time on the closing of these titles, upon the four titles which were pronounced to be good, what would have been the date of that policy of insurance?" The witness answered: "The date of the recording of the deeds." Another witness for the defendant named Green, who was manager of a New York title insurance company, was asked: "In a case where several pieces of property were transferred, but on different dates, and the record date of the different deeds bore, of course, different dates, what, under such circum-

stances, does the policy if it bears a single date and is a single policy show in the custom of your business?" The answer of the witness was: "As a matter of form it would bear the date of the face of the last deed, but as to its application it would only have the application of the record dates of the several deeds." And, again, a witness, Bailey, was asked: "In what respect does this policy fail to conform to the usual form of title insurance policy under these circumstances?" His answer was: "It insures against liens, subsequent to the date of the acquiring of the title of a number of the properties set forth in the policy." In these three instances which, as we have said, are merely illustrative of numerous others, defendant's witnesses testified to what they would have done under similar circumstances; to the custom of other title insurance companies in such cases, and to the legal conclusion that the policy should have been different in form.

This unique and summary disposition of the whole case would excite no less surprise than criticism were it not for the embarrassments by which the learned trial court and the counsel for the defendant were surrounded. A former trial court had held, in substance, that the mistake in the policy was obvious on its face, or that it should at least be so construed as to cover no liens or incumbrances accruing after the several titles had vested in the plaintiff. The appellate court had disagreed with this view and ordered a new trial on the ground that the policy as written covered the assessment, which became a lien upon the "Crescent" property prior to the date of the policy, although after defendant took title thereto, and that the policy would have to be reformed before the defendant could be relieved from liability. These embarrassments were accentuated by the fact that this was not the usual case of mistake caused by a misunderstanding of terms expressed in conversation and inaccurately or erroneously transcribed into the written instrument; on the contrary, the mistake was the result of inadvertence in the failure of the parties to notice that the date of the policy, unquali-

fied and unexplained, had the effect of creating a contract that was not intended to be made by either party. As the Appellate Division had laid down no rule of procedure for the second trial it was obvious there was but scant room for competent oral evidence, unless the opinions of experts in title insurance could be received, and this probably accounts for the freedom with which incompetent testimony was offered and admitted when once the forbidden field had been entered.

We hold that the opinions of the experts were not competent, and when that testimony is expunged from the case it becomes apparent that the unanimous affirmance in the Appellate Division will not support the judgment herein unless the nature and purpose of the contract, coupled with the facts and circumstances surrounding the transaction, are such as to justify or require a reformation of the policy. In determining that question it becomes necessary to scrutinize somewhat more closely the contract as written, its nature and purpose, the conditions under which it was made, and the legitimate oral evidence, if any, bearing upon the transaction.

First. As to the written contract. In the body of the policy the defendant undertakes to insure the plaintiff "against all loss or damage, not exceeding Four hundred thousand dollars, which the insured shall sustain by reason of any defect or defects of title affecting the premises described in schedule 'A' hereto annexed, affecting the interest of the insured therein as described in said schedule, or by reason of unmarketability of the title of the insured to or in said premises, or by reason of liens or incumbrances charging the same at the date of this policy." The policy is dated April 24th, 1893. The premises described in schedule "A" are the five pottery plants above referred to. The assessment which occasions this suit became a lien in October, 1892; or seven months prior to the date of the policy. Upon these facts, considered alone, there could hardly be any controversy as to the meaning of the contract. But schedule "A" enumerates the several deeds by which the five pottery plants were conveyed to the plaintiff, and shows that four of them, including

the one affected by the assessment, are dated June 16th, 1892, and were recorded July 8th, 1892, which was three months before the assessment became a lien. The plaintiff went into possession of these four plants immediately upon taking title thereto, although the deeds thereof were left with the defendant pending the perfecting of the title to the fifth plant and the issuance of the policy.

Second. As to the nature and purpose of the contract. The contract is one of insurance against defects in title, unmarketability, liens and incumbrances. The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens or incumbrances that may affect or burden his title when he takes it. It must follow, as a general rule, therefore, that when the insured gets a good title, the covenant of the insurer has been fulfilled and there is no liability. It is also apparent from the very nature of the contract that it usually bears the same date as the deed of the title which it purports to insure, and that if, in a given case, there is a discrepancy between these dates, it must be due to some exceptional circumstance which should be noted in the contract. In the contract before us the absence of any special note as to the date negatives any intention to take this case out of the general rule.

Third. As to the facts and circumstances under which the contract was made. The plaintiff, as a part of its plan of organization, was to take over the title to the five potteries above named. Four of these titles were perfected July 8th, 1892. Had the fifth title been ready at the same time, the policy of insurance upon the five titles would, of course, have been issued at that time. The fifth title being imperfect, the question arose whether the defendant should then issue separate policies upon each of the four perfected titles and issue a fifth one when the outstanding title was made good; or whether the plaintiff desired to cover the four perfected titles with one policy then to be issued, and the other title,

when perfected, with a second policy; or whether a single policy covering all the titles would be issued when all were perfected. It was finally decided to pursue the latter course, and the testimony of Halsey, the defendant's representative, as to the conversation between him and Mr. Ledyard, of counsel for the plaintiff, clearly shows how it came about. He says: "After the titles to the four pieces of property were closed, Mr. Ledyard asked me for our policy of title insurance. I explained to him that it was impossible for us to prepare the policy insuring the titles of this kind before the matter was closed, and I offered to deliver the policy to him by the next day if he wished it. He then suggested that we could not guarantee the title of the fifth piece anyway, and I asked him whether he would prefer to wait for his policy until the Trenton Potteries Company had taken title to the fifth piece and then to have a single policy covering all their property, or whether he would have a policy for the four pieces at once, and a separate policy for the fifth piece when his company had taken title. He asked me whether I thought that the Title Company would be responsible anyway if the title were bad and laughed when I said I thought they would be. He then consulted with the officers of the company who, with several members of the new company and former owners of the property mentioned above, were in one of his offices, I being present, and it was decided that the more convenient way would be to take a single policy when they acquired title to the fifth piece and not to take any policy at that time for the four pieces."

In the foregoing combination of elements, which may properly be considered in determining what the contract between the parties was intended to be, we have, as it seems to us, the clearest indication that there was no purpose on the part of either party to have any of the titles insured beyond the moment when they became the property of the plaintiff. This is attested by the nature and purpose of the contract, the absence of any special condition therein taking the case out of the ordinary rule, and by the conversations between

Halsey and Ledyard, from which it appears that the issuance of a single policy, after all the titles were perfected, was agreed upon as a matter of convenience and with no thought or suggestion of changing the liability of the defendant from what it would have been if a policy upon the four titles had been issued when the conveyances thereof were made. The whole transaction tends to show that there was no mistake as to the actual terms of the agreement, but that in reducing it to writing the real date as to a part thereof was inadvertently omitted. That is the sum and substance of the whole matter. Upon these competent facts and circumstances alone the trial court should have reformed the written policy so as to make it conform to the actual agreement of the parties, and in this view of the case the excision of the incompetent evidence referred to does not affect the result. This conclusion seems to be supported by either one of the following two views that may be taken of the transaction: If there was no mistake in the agreement as made and understood between the parties, and the scrivener in reducing it to writing inadvertently omitted an essential element thereof, the court had the right to reform the written contract, under the case of *Born v. Schrenkeisen* (110 N. Y. 55); if, on the other hand, this is regarded as an instance of actual mistake in the making of the contract, then the mistake was mutual and the reformatory power of the court is properly invoked on that ground. The evidence of Halsey as to the conversation between him and Ledyard when the first four titles were passed, was competent as bearing upon the date which the subsequently issued policy should have borne in relation to those titles. Oral evidence of mistake in the date of a written instrument is always admissible. (*Kincaid v. Archibald*, 73 N. Y. 193.)

Counsel for the plaintiff and appellant in the course of his very able argument, suggested that defendant had been negligent in searching these titles, and for that reason it should not be permitted to escape its liability as an insurer. Whatever the fact may be in regard to defendant's alleged negligence, it is enough to say that this action is not based upon that

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ground. The contract of insurance is distinct and separate from the contract of searching. This action is brought upon the contract of insurance. Under the contract for searching titles the defendant may be liable for any damages which its negligence may have imposed upon the plaintiff. (*Ehmer v. Title Guarantee & Trust Co.*, 156 N. Y. 10.) Under the contract of insurance no question of negligence in searching can arise.

For these reasons the judgment herein should be affirmed, but in view of the apparent justification of this appeal by reason of the incompetent evidence received at the instance of the respondent, the affirmance should be without costs.

O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ., concur; MARTIN, J., not voting.

Judgment affirmed.

JOHN WANAMAKER, Respondent, v. SIMON J. WEAVER,
Appellant.

HUSBAND AND WIFE — LIABILITY OF HUSBAND FOR GOODS PURCHASED BY WIFE — WIFE'S AGENCY A QUESTION OF FACT. A husband living with his wife, who supplies her with necessities suitable to her position and his own, or furnishes her with ready money with which to pay cash therefor, is not liable for the purchase price of other goods sold to her, of the same character as necessities, in the absence of affirmative proof of his prior authority or subsequent sanction, the question of the wife's agency being one of fact and not a conclusion of law to be drawn alone from the marital relation.

Wanamaker v. Weaver, 73 App. Div. 60, reversed.

(Argued June 17, 1903; decided October 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 22, 1902, reversing a judgment in favor of defendant entered upon a verdict and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Opinion of the Court, per HAIGHT, J.

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Charles Van Voorhis for appellant. The case was submitted to the jury without error. (*Cromwell v. Benjamin*, 41 Barb. 558; *Reneaux v. Teakle*, 20 Eng. L. & Eq. 345; *Bergh v. Warner*, 47 Minn. 250; *Raynes v. Bennett*, 114 Mass. 424; *Compton v. Bates*, 10 Ill. App. 78; *Davis v. Caldwell*, 12 Cush. 512; 2 Lawson on Personal Rel. § 726; Schouler on Dom. Rel. § 61; *Burghart v. Angerstein*, 6 C. & P. 690; *Freestone v. Butcher*, 9 C. & P. 643; *Reid v. Teakle*, 13 C. B. 627; *Bentley v. Griffin*, 5 Taunt. 356.) No errors were committed by the trial court in its rulings on evidence. (Schouler on Dom. Rel. § 64; *Merritt v. Briggs*, 57 N. Y. 651; *Pope v. McGill*, 58 Hun, 294.)

Harry Otis Poole for respondent. There was no question of fact as to whether the articles sold were "necessaries." They were concededly so. The trial court erred in submitting this question to the jury, and also in its submission of the law as stated during the trial as to the right of the defendant to show that his wife was abundantly supplied with articles purchased elsewhere. (Schouler on Dom. Rel. § 64; Stewart on Husband & Wife, §§ 94, 95; *Waithman v. Wakefield*, 1 Camp. 102; *Keller v. Phillips*, 39 N. Y. 354; *Zimmer v. Settle*, 124 N. Y. 45; *Manby v. Scott*, 1 Mod. 124; *Dyer v. East*, 1 Ventr. 42; *Johnson v. Sumner*, 3 H. & N. 266.) It is clear from the evidence that the goods were sold on the credit of the defendant and the trial court erred in submitting this question to the jury. (*Tiemeyer v. Turnquist*, 85 N. Y. 516; *Kegney v. Owens*, 18 N. Y. S. R. 482; *Lindholm v. Kane*, 92 Hun, 369; *Winkler v. Schlager*, 64 Hun, 83; *Lamb v. Milnes*, 5 Vesey, 520; *Knox v. Pickett*, 4 Desaus, 92; *Haygood v. Harris*, 10 Ala. 291; *Curtis v. Engel*, 2 Sandf. Ch. 287; *Matter of Shipman*, 22 Abb. [N. C.] 291; *Graham v. Schleimer*, 28 Misc. Rep. 535.)

HAIGHT, J. This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's

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knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that while the goods might ordinarily be deemed necessities they were not in fact such, for the reason that the defendant lived on a salary of \$2,000 per year, out of which he delivered to his wife \$1,500 in monthly installments of \$125 with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled and an exception was taken. The court in discussing the question stated the law to be as follows: "that if a married woman goes to a merchant and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similar articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband cannot be held responsible unless there is some affirmative proof of actual authority, outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question as to whether the plaintiff gave credit to the defendant, or to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made, submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the purchase, and, therefore, the

articles were not necessary for her support and maintenance. The majority of the judges of the Appellate Division appear to have entertained the view that, if the articles purchased by the wife were of the character ordinarily deemed necessities, such as clothing, table linen, towels and napkins, the merchant was at liberty to furnish her therewith and charge her husband therefor, without regard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated. That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make inquisitorial examination and ascertain whether the family possess an adequate supply of the articles which the wife desires to purchase."

It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of *Keller v. Phillips* (39 N. Y. 351) the husband had given the merchant notice not to give the wife further credit, and in the case of *Hatch v. Leonard* (165 N. Y. 435) the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case. In the case of *Cromwell v. Benjamin* (41 Barb. 558) the General Term sustained the right of a merchant to recover of the defendant for the necessities furnished to his wife. J. C. SMITH, J., in delivering the opinion, states the law, as he understood it, as follows: "But the husband may be liable for necessities furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence, and this, upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to

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the wife, so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessaries himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessaries." In *Bloomington v. Brinkerhoff* (2 Misc. Rep. 49; 49 N. Y. St. Rep. 142) it was held that in order to entitle the tradesman to recover from the husband it was incumbent upon him to show that "the articles supplied to the wife were not only of the kind usually denominated necessaries, because their need is common to all persons, but that in consequence of the inadequacy of the husband's provision they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states bearing upon the liability of the husband for necessaries, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases in England where the question appears to have been more thoroughly considered in the higher courts. In the case of *Debenham v. Mellon* (L. R. [5 Q. B. Div.] 394), BRAMWELL, L. J., in stating the question involved, says: "The goods were necessaries in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessaries in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them." He then proceeds to state the cases in which the husband would be liable. As for instance, where he turns his wife out of doors, or conducts himself in such manner as to oblige her to leave him, she may provide herself at his expense and pledge his credit for necessaries, such as food, apparel, lodging and medicine. In case they are living and cohabiting together and there has been a custom of contracting short credit as to a class of

articles, such as grocery and meat bills, her authority to order the same may be inferred, not for the reason that it springs out of the contract of marriage, but because of her existing relation as the head of his household ; that the same authority would be inferred in favor of a sister, or a housekeeper, or other person who presided over the management of his house. The judge concluded by holding that the husband was not liable. The same case was subsequently brought up for review in the House of Lords (L. R. [6 Appeal Cases] 24). Lord Chancellor SELBORNE then considered two questions. The first was whether the mere fact of marriage implies a mandate by law, making the wife the agent in law of her husband, to bind him by her contract, and to pledge his credit. Upon this point he says that "according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity ; a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her,—but not when the husband and wife are living together, and when the wife is properly maintained ; because there is, in that state of circumstances, no *prima facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing." The second question considered by the lord chancellor was whether the law implied such a mandate from the fact of cohabitation. Upon this point he says : "If, therefore, the law did imply any such mandate from cohabitation, it must be an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities which shew that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some *prima facie* evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, * * * because, in that state of circumstances, the husband may truly be said to do acts, or habitually to con-

sent to acts, which hold the wife out as his agent for certain purposes. * * * But where there has been nothing done, nothing consented to by the husband to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound, but the question must be examined as one of fact and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *prima facie*, and not absolute; not a presumption of law, but one capable of being rebutted." The chancellor then proceeds to consider the facts in the case and concludes by holding the husband not liable, stating that: "It was argued that because these articles were found to be in some sense necessities in their nature the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessities if he made a reasonable allowance to his wife and duly paid it; much less can he be bound in a case like this where they were not living apart and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing."

In the still more recent case of *Morel Brothers and Company, Ltd., v. The Earl of Westmoreland* (L. R. [1 K. B. 1903] 64), it was held that the presumption which arises that the husband has given the wife authority to pledge his credit for necessities may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses. In this case MATHEW, L. J., concludes his opinion by stating: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of

agency and it is incumbent on them to prove the wife's agency. They can easily protect themselves from any great risk in such cases, but if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

Schouler on Husband and Wife (Sec. 107) sums up the authorities upon the subject as follows: "Not only is the husband permitted to show that articles in controversy are not such as can be considered necessities, but he may show that he supplied his wife himself, or by other agents, or that he gave her ready money to make the purchase. This is on the principle that the husband has the right to decide from whom and from what place the necessities shall come, and that so long as he has provided necessities in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly, in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessities at his own home he is not liable to provide them elsewhere. In general, while the spouses live together, a husband who supplies his wife with necessities suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction." For further authorities and discussions upon the subject see 10 Central Law Journal, 341; 54 Central Law Journal, 472; 18 Am. Law Reg. (N. S.) 412-416 (Judge BENNETT's note); 20 Am. Law Reg. (N. S.) 324 (Judge BENNETT's note); *Clark v. Cox* (32 Mich. 204).

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor; that the question of

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her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a proper case, and at the same time affords him some financial protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. We do not participate in the alarm which appears to have possessed the learned justices of the Appellate Division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before and where consequently there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. The judgment of the Appellate Division should, therefore, be reversed, and that entered upon the verdict affirmed, with costs.

GRAY, VANN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., dissents; MARTIN, J., absent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. CARMINE GAIMARI, Appellant.

1. MURDER—SUFFICIENCY OF EVIDENCE. The evidence upon the trial of an indictment for murder reviewed and held sufficient to warrant a verdict convicting the defendant of the crime of murder in the first degree.

2. EVIDENCE—COMPETENCY OF THREATS MADE BY DEFENDANT. Threats of the defendant to kill the deceased, made a short time before the homicide, are competent evidence especially when the homicide is claimed to have been excusable or justifiable, but should be received with caution, since many an idle threat is made, and words spoken under excitement are liable to be misunderstood.

3. INCOMPETENCY OF EVIDENCE OF SPECIFIC ACTS OF VIOLENCE OF DECEASED TOWARD THIRD PERSON. Where the accused claims that he acted in self-defense, it is competent to show the general reputation of the deceased for violence, but evidence of specific acts toward a third person, especially where it does not appear that defendant had heard of them, is inadmissible.

4. CHARGE. Error cannot be predicated upon a charge which is too lenient toward the defendant and is in accordance with the request of his counsel.

(Argued June 19, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Court of General Sessions of the Peace in the county of New York, rendered February 27, 1903, upon a verdict convicting defendant of the crime of murder in the first degree; also from two orders of said court denying motions for a new trial and in arrest of judgment, respectively.

The indictment charged that on the 6th of October, 1902, at the borough of Manhattan, county of New York, the defendant, feloniously and with malice aforethought, took the life of Josephine Santa Petro by shooting her with a revolver. The facts, so far as material, are stated in the opinion.

Charles E. Le Barbier for appellant. The verdict was against the evidence, and the weight of evidence, and against the law. (*People v. Filipelli*, 173 N. Y. 509; *People v.*

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Decker, 157 N. Y. 186; *People v. Kennedy*, 164 N. Y. 458; Code Cr. Pro. § 528; *People v. Johnson*, 70 App. Div. 308; *People v. Fitzgerald*, 156 N. Y. 253; *People v. Bron*, 90 Hun, 509.) The learned trial court erred in not instructing the jury upon the law of justifiable homicide. (*Conners v. Walsh*, 131 N. Y. 590; *People v. Helmer*, 154 N. Y. 596; *People v. Chartoff*, 72 App. Div. 555; *People v. Cantor*, 71 App. Div. 185; *People v. Glennon*, 175 N. Y. 55.)

William Travers Jerome, District Attorney (*Robert C. Taylor* and *Howard S. Gans* of counsel), for respondent. The question of premeditation and deliberation was clearly one for the jury under the circumstances of the case. (*People v. Conroy*, 97 N. Y. 62; *People v. Sliney*, 137 N. Y. 570; *People v. Decker*, 157 N. Y. 187; *People v. Beckwith*, 108 N. Y. 67; *Leighton v. People*, 88 N. Y. 117; *People v. Zachello*, 168 N. Y. 35; *People v. Cignarale*, 110 N. Y. 23; *People v. Walworth*, 4 N. Y. Crim. Rep. 355.) The defendant's claim of self-defense was manifestly a question of fact for the jury. (*People v. Constantino*, 153 N. Y. 24; *People v. Sullivan*, 173 N. Y. 122; *People v. Conroy*, 97 N. Y. 62; *People v. McGuire*, 135 N. Y. 639; *People v. Cullen*, 23 N. Y. S. R. 559.)

VANN, J. At the time of the homicide the defendant lived with his wife in a double tenement house known as No. 56 Roosevelt street, in the city of New York, and Josephine Santa Petro, the deceased, lived with her husband in the same building. The defendant worked in Jersey City, and the deceased was janitress of the building in which both resided. He was 31 years old, weighed 130 or 135 pounds and was not quite as tall as the deceased, who was about 40 years of age, five feet and six inches in height, weighed from 175 to 180 pounds, and was a strong, robust, muscular woman. They were acquaintances, more or less intimate, and there was some evidence of jealousy of the deceased on the part of the defendant's wife and of threats made by the former that she would

kill the defendant and his wife and that these threats had been communicated to him.

Maggie Santa Petro, a little daughter of the deceased, twelve years of age, testified that a few days before the homicide the defendant came up to the rooms occupied by her father and his family and, knocking at the door, said he was the landlord, Mr. Golden, but the door was not opened, whereupon he broke in the window, "pulled out a revolver and he pointed it in; my mother ran in the front room door; he said 'I was going to leave you dead in Roosevelt Street.'" Two days before the homicide, a precept issued by a local court, requiring the defendant forthwith to remove from his rooms at No. 56 Roosevelt street or show cause before the court on the 7th of October, 1902, at ten A. M., why possession of the premises should not be delivered to Barnard Golden, the landlord, was served upon the defendant and was found upon his person immediately after the homicide.

The homicide took place on the 6th of October, 1902, between nine and ten in the morning, at No. 56 Roosevelt street. The witnesses who saw the occurrence, in whole or in part, differ somewhat in their versions, so that a review of the case upon the merits, which is substantially the only duty presented by the record, requires an analysis of the evidence.

William Gibson, a seafaring man, was in front of No. 56 Roosevelt street, on the opposite sidewalk, between half-past nine and ten o'clock on the morning of Monday, October 6th, 1902. He saw three women standing in front of No. 56, when a man came out of the doorway, whom he identified as the defendant. The defendant "made a reach for a woman that was standing in the crowd, and as he did so he drew a revolver out of his hip pocket and fired two shots at her; she was dodging around the other women and started to run into the shoe store right next door to No. 56, and as she was going through the door into the place he fired three more. I never heard of the people before. I did not know that they were on earth. After the second three shots were fired at the woman as she went into the door of the cobbler's shop, I went

across the street to the sidewalk where she was shot. I seen her lying in there and I started back—lying in the shoe-maker's shop, right by the casing at the windows, the cobbler's bench there. I seen blood on the side of her dress."

Kate Looney, who lived at No. 56 Roosevelt street, was talking to Mrs. Petro as she was cleaning the bells by the front door, when the defendant came down stairs and said to the deceased, "You did this," and she said, "I didn't do it, the landlord did it." Thereupon the defendant caught her by the throat and commenced to shove her. The witness thought he was fooling until she saw him pull a revolver out of his pocket and fire three shots, when she ran into the shoe-maker's shop, followed by the deceased, who in turn was followed by the defendant. When the defendant went in he fired another shot, and the witness observed nothing more except that she saw him throw away the revolver. "He was in the store when he chucked it away. He chucked it in the back of the store." The night before, this witness heard the defendant say to the deceased, as he passed by her at the front door, "This is your last night of living." She further testified that when the defendant "fired those shots at the housekeeper he was right up at her side; he had his hand on her when he fired them at her in the store." When sworn before the coroner she did not say that she saw the defendant throw away the revolver.

Angelina Granero lived at No. 56 Roosevelt street, and going down stairs to pay her rent to Mrs. Petro saw her cleaning the knobs of the bells by the front door. While she was engaged in paying her rent the defendant came down stairs and said to Mrs. Petro, "Give us the money." She replied, "No, I wasn't going to give you no money; if I've got to give you any money call me to the court and don't talk to me; don't speak to me; talk to my husband; I don't want you to be talking to me." He asked her for the money again and she said: "Don't be doing me anything; if you do me anything I will call a policeman and make you arrested." In the

language of the witness: "From these words they started to be fighting," and, alarmed, she turned to go when Mrs. Petro caught hold of her dress. She next heard three shots from behind her, the hold on her dress was relaxed and she ran away, but looking back saw the defendant shoot again. By fighting, the witness may have meant quarreling, for when asked if the parties were striking at each other she answered: "No, sir; fighting, talking."

Louis Cairia testified that he was a shoemaker and was at work in his shop in the front part of No. 56 Roosevelt street at about eight or nine o'clock on the morning of the homicide. He heard a shot and raising his head saw the defendant pursuing the deceased, about three feet from her and shooting at her "in front and in the back, anywhere she turned." He heard three shots fired outside when he ran out of his shop and the deceased ran in followed by the defendant with a pistol in his hand. After that the witness heard one or two shots inside. The defendant was close to Mrs. Petro as the witness looked up and saw the second and third shots. At this time he saw the defendant shoot at her in front and when she turned he saw him shoot at her back.

Daniel A. Walsh, a collector, was walking down Roosevelt street on the morning in question shortly after half-past nine o'clock. When about opposite No. 56 he heard the report of a revolver and turning saw a woman running from the hallway followed by a man, whom he identified as the defendant. She was running from him and he had his left hand on her right shoulder. He next heard two shots in quick succession when she turned and went into the cobbler's shop followed by the defendant and after that he heard two more shots, making five in all. He went into the shop and saw the woman with blood coming from her back and a wound in her abdomen. Her apron was burned with powder. He saw a man put his hand on defendant and hold him until he was turned over to the police. A few minutes later the witness picked up a revolver in the air shaft at the back part of the store. Each of the five chambers contained an empty shell and the revolver

was hot when he picked it up. It was identified by several witnesses as the one with which the shooting was done.

Three of these witnesses and two others testified that when the defendant was arrested right after the shooting, he was taken before Mrs. Petro, who was still living. She was asked if he was the man who shot her. She could not speak but nodded her head. In broken English the defendant denied that he did the shooting.

The defendant was seized as he was "trying to get out" of the shoe shop and held until the arresting officer came and took him in custody. A watch, fifteen or sixteen dollars in money and the precept to dispossess, returnable the next day, were found upon his person. The officer asked him why he did it and he said he did not do it. After the revolver was found he was asked if it was his and he said it was not.

The interne in charge of the ambulance found Mrs. Petro, at about ten o'clock, lying on the floor of the cobbler's shop, still conscious but suffering from shock. Her clothes were saturated with blood and burned in two places, one in the back just behind the right shoulder and the other in front over the right groin. Beneath each burned spot there was a pistol shot wound in the body. She was taken to the hospital and died in about thirty minutes.

The physician who made the autopsy found two pistol shot wounds, one in the back about two inches to the right of the median line, above the right shoulder blade. The bullet which made that wound lodged in the muscles of the back. The other wound was in front on the right side of the body and the bullet after penetrating the abdominal cavity passed through the bladder and was found in the muscles on the left side. It was of the same calibre as the revolver that was found right after the shooting, both being number 32. The wound in the abdomen, with the internal hemorrhage resulting, was, in the opinion of the physician, the cause of death.

The defendant when sworn in his own behalf denied the occurrence testified to by the little girl Maggie, in relation to his breaking into the room of the deceased with a revolver in

his hand, and said that he never had a revolver in his possession. He also denied that he ever threatened to kill Mrs. Petro. He testified that on the morning in question he went down stairs to see the owner of the building and found the deceased and another woman. He said, "Good morning," and as he was passing by Mrs. Petro she said, "Come here." As he was going toward her "she drew the revolver and I, with a jump, grabbed hold of her hand; when so doing two shots fired in the air, and while I was wrenching the revolver from her hand the revolver went off; in that moment I lost my hat, and while I was picking up my hat from the ground she ran away, and I myself tried to get away and entered the shoe store where I saw her — I met her; she grabbed hold of me and I put my arms around her, and seeing that she was fainting I put her in a chair. I never supposed in that moment that she was wounded. Then the policeman came up and I was arrested, without any resistance." He did not intend to shoot her. He had heard that Mrs. Petro had made a threat against his life, and believed he was in danger of his life. He gave her his salary every week, "because from the first day that she got affectionate with me, she didn't want me to give the money to my wife." He did not go to work that day because he wanted to know from his landlord "what for he dispossessed me, when I had paid up everything."

He further testified that when Mrs. Petro drew the revolver she pointed it at him, being about three and one-half feet away. He grabbed her right hand and held it up, when two shots went off in the air, and while he was wrenching her hand to get the revolver away "three shots went off." The record then continues as follows: "By the court: Ask him if he wrenched the revolver from her and if he succeeded in getting it away from her. A. Yes, I succeeded. Q. What did he do with the revolver afterward? A. She was holding me around my body and I fired the revolver; I shot the revolver. Q. Now when did you fire the revolver? A. After the shots went off and she had clasped her hands around my body and did not want to leave the revolver go. * * * I fired

it at nobody. I wanted to unload it in order to prevent her from doing harm to me. * * * The revolver dropped on the sidewalk, and since that time I didn't see it any more. * * * I didn't see her enter the shoe store. Q. Well, you went into the cobbler shop yourself, didn't you? A. Yes, for fear she had some other weapon, because she always had a knife with her. * * * By the Fifth Juror: Q. I would like to know in what direction you fired these shots; how you held the revolver when you fired these two or three shots? A. I could not say that because of the position in which she held it, clasping around her arms. I tried to shoot to the ground. I didn't want to shoot at her."

Julia Osnato testified that about eight o'clock on the morning of the homicide she told the deceased that the defendant and his wife were going away. She replied that if they were going away she would kill them both. The witness did not tell the defendant this, but told his wife.

The defendant's wife testified that he never carried a revolver. At about half-past nine on the morning of the homicide "my boy commenced to cry for his father and I opened the window and allowed him to see his father and then I saw the house-keeper and my husband was talking both together, * * * near the door of the house. I noticed that they were quarreling together, and I from the window hollered to my husband, saying that he had better leave her alone. Then I saw that the woman drew a revolver and pointed it and that my husband went against her to stop her." She started to run down stairs and on the way heard shots ring out. She was agitated and trembling, and when she reached the sidewalk the police had arrived. She also said that the deceased had threatened "all the time" to destroy both her husband and herself, and that she told him so. She lived on the fifth floor of the building, and whatever she saw was from a window at that elevation.

Guiseppe Alzerana testified that on the morning of the homicide he was out selling bread, and when near No. 56 Roosevelt street saw a man and woman quarreling. She took

a revolver from her dress, the man came against her and the witness ran away, but heard the shooting immediately.

Several witnesses, one a brother-in-law of the defendant, testified that his reputation for peace and quietude was good. Evidence was given by his employer in Jersey City that the defendant worked every day and all day during the latter part of September and the fore part of October, which covered the period when the daughter of the deceased said that he came to their family rooms with a revolver.

In rebuttal, another daughter of the deceased, fifteen years of age, testified that she did not know of her mother having a pistol. The husband of the deceased said he had lived with her nineteen years and never knew her to have a revolver.

These are the salient facts sworn to by the various witnesses. According to the theory of the defendant he made no threats, had no revolver and used no violence until the deceased wantonly attacked him. He claims that she had threatened his life and was the aggressor; that she was superior to him in size and strength; that as he was passing by her on his own business she called him to her, drew a revolver from her bosom and was about to shoot him, when, apprehending that his life was in danger, he wrenched the weapon from her and as he did so it went off, accidentally so far as he was concerned; that after that, with his arms still around her, he fired the revolver so as to unload it; that he did not intend to shoot her but tried to shoot toward the ground and that all he did was in lawful self-defense. His theory finds some corroboration in the testimony of other witnesses.

On the other hand, the People claim that the defendant had twice threatened to take the life of Mrs. Petro; that while she was peacefully engaged in attending to her ordinary duties the defendant either accused her of doing something which she denied, or he asked her for money; that both of these statements may have been made, as the evidence does not exclude either; that without provocation or warning he drew a revolver from his pocket and fired at her five times as she was fleeing from him; that after three shots had been fired

she ran into the shoe shop and he followed her, although he might then have run away if he was afraid of his life; that according to his own statement, when trying to escape from danger he tried to pick up his hat; that if in fear of his life he could have sought protection in the police station but 150 feet away, but instead he followed her into the shoe shop and shot at her twice there, where she was soon found in a dying condition with one wound in her back and another in her abdomen.

It is argued that the defendant shot Mrs. Petro, for no one else was seen to shoot her and she could not have shot herself in the back. The People claim that he shot her with a deliberate and premeditated design to take her life and that all the circumstances tend to show that he was the aggressor from the outset and executed the threats which he had repeatedly made.

While the defendant claims that the homicide was accidental and hence excusable, or in self-defense and hence justifiable, the People insist that these defenses are inconsistent. He clearly had the right to rely on inconsistent defenses, but it is significant that only one could rest on truth. Either defense makes motive important, and, while no motive to murder can be adequate, still it may be obvious. Service of the precept to dispossess and the statement of the defendant to Mrs. Petro that she caused it, as sworn to by Mrs. Looney, are relied upon by the People to establish a motive; while threats made by the defendant to kill Mrs. Petro and by her to kill him and his wife are relied upon by both parties.

• The defendant and his wife testified that he never had a revolver and several of his witnesses said that Mrs. Petro drew the revolver in question from her bosom. On the other hand, the husband and the daughter of the deceased say that she never had a revolver. Another daughter said that a few days before the homicide the defendant had a revolver and threatened to use it upon her mother, while two witnesses for the People testified that they saw the defendant draw the revolver from his pocket and shoot five times at Mrs. Petro. The defendant swore that he wrenched the revolver from the

deceased, dropped it on the sidewalk and that he did not see it afterward. A witness for the People testified that she saw him throw away the revolver, after the shooting, in the back part of the shoe shop and several witnesses swore to the finding of the revolver in the air shaft at the rear of the shop, and one that it was then hot, with five empty shells in it. The People further claim that the statement of the defendant's wife, that she saw what she testified to while holding her little boy out of the fifth story window so that he could see his father on the sidewalk, is too improbable for belief.

It is unnecessary to review the case, upon the merits, at greater length, for enough has been said to show that the question as to the defendant's guilt, as to the grade of his offense if he was guilty, as to his claim that he acted in self-defense or that the homicide was the result of accident, were for the jury. They could look into the faces of the various witnesses as they gave their versions of the transaction and decide, so far as human judgment can tell, not only who intended to speak the truth, but who in fact spoke the truth. Representing the average judgment of mankind, they could separate the true from the false with a degree of accuracy which, according to the theory of our law founded on the experience of many generations, cannot be attained by reviewing judges. The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative.

Clearly the case was for the jury to decide and we cannot say that their verdict was against the weight of evidence or against law or that justice requires a new trial.

The exceptions are few and unimportant. The defendant moved to strike out the testimony of Kate Looney and Maggie Santa Petro in relation to the threats of the defendant to kill the deceased made a short time before the homicide on the ground that it was immaterial and incompetent, but the motion was denied and an exception was taken.

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For time out of mind recent threats have been held competent to show the state of the defendant's mind toward the deceased. (*La Beau v. People*, 34 N. Y. 222, 229, 232; Archibald's C. P. 283; Wharton's Crim. Ev. [9th ed.] § 756.) They are of special importance when the accused claims that the homicide was excusable or justifiable. Although clearly competent they should be considered with caution, for many an idle threat is made, and words spoken under excitement are liable to be misunderstood.

The defendant was not allowed to show specific acts of violence alleged to have been committed by the deceased upon his wife, no offer having been made to prove that he knew of them. We find no error in this ruling. When the accused claims that he acted in self-defense, it is competent to show the general reputation of the deceased for violence, but evidence of specific acts toward a third person, especially when it does not appear that the defendant had heard of it, is inadmissible. (*People v. Druse*, 103 N. Y. 655, 656; *Thomas v. People*, 67 N. Y. 218; *Eggler v. People*, 56 N. Y. 643; *People v. Lamb*, 2 Keyes, 360-371.)

As was said by Judge EARL in *Thomas v. People* (*supra*): "There is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res gestæ* and in no way connected with the prisoner, is competent."

We have considered the other exceptions, but find none which merit the expression of reasons for holding that they raise no error.

No exception was taken to the charge. The court charged each of the fourteen requests presented by the learned counsel for the defendant, including the following: "That use of force or violence upon or toward the person of another is not unlawful when committed by the party about to be injured, if the force or violence used is not more than sufficient to prevent such offense." In the body of his charge the learned trial judge said to the jury: "On the main defense offered in behalf of the defendant — justifiable homicide — I will read you the law and you will see whether it properly applies.

In the Penal Code it is enacted that 'to use, or attempt or offer to use, force or violence upon or toward the person of another is not unlawful when committed by a party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, if the force or violence is not more than sufficient to prevent such offense.' " The learned trial judge thus inadvertently read from section 223 of the Penal Code, which relates to the use of force or violence to prevent an assault. (Penal Code, § 223, par. 3.) He doubtless intended to read section 205, which relates to justifiable homicide and lays down a more stringent rule in relation to the use of violence resulting in homicide, by limiting it to an occasion "when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, * * * and there is imminent danger of such design being accomplished." Thus the charge was more favorable to the defendant than he was entitled to. The effect of the charge was that if the defendant thought he was about to be injured by Mrs. Petro he had a right to take her life, which was erroneous, but the error injured the People and benefited the defendant.

The learned judge, however, further instructed the jury that they were "to determine from the testimony whether this defendant had good and reasonable grounds to believe that he was in danger of his life, or of grievous bodily injury, and whether what occurred after he had wrested this pistol from the hands of the deceased and had it in his possession, was more than sufficient force to avert the danger that he apprehended. From the plain wording of the statute you will see that it applies only where a party is about to be injured." This was a nearer approach to the correct rule, and it is obvious that there is nothing in the charge upon the subject of justifiable homicide of which the defendant has a right to complain, for it was not only too lenient toward him, but it was in accordance with the request of his own counsel.

After carefully considering this case and every error alleged,

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whether raised by an exception or not, we find nothing that should disturb the verdict, and the judgment pronounced against the defendant must be affirmed.

The judgment and orders should be affirmed.

PARKER, Ch. J., GRAY, HAIGHT, CULLEN and WERNER, JJ., concur; MARTIN, J., absent.

Judgment of conviction affirmed.

ELIAS BAER, as Executor of GEORGE BAER, Deceased, Respondent, v. JOHN G. McCULLOUGH et al., as Receivers of THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellants.

1. PRACTICE — CONTINUANCE OF ACTION IN STATE COURT AGAINST RECEIVERS APPOINTED BY FEDERAL COURT AFTER THEIR DISCHARGE — CODE CIV. PRO. § 758. An action against railroad receivers appointed by a federal court brought in the Supreme Court of the state of New York under the Revised Statutes of the United States, authorizing the bringing of actions without previous leave of the court against a receiver appointed by a federal court in respect to any act or transaction of his in carrying on the business connected with the property, is not necessarily terminated as to them by their subsequent discharge and the transfer of the property pursuant to a decree of foreclosure and sale made by the federal court, and the plaintiff is not obliged to substitute the purchaser thereunder as defendant before proceeding to judgment; under section 758 of the Code of Civil Procedure, in case of a devolution of liability, the court may substitute the party upon whom the liability is devolved, but when it does not, the action is properly continued against the original parties.

2. SAME. The fact that the statute authorizing the bringing of the action contains the provision, "But such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed," does not require the discontinuance of the action against the receivers after their discharge, upon the ground that the federal court having provided by the decree a method for establishing claims against the fund that was in the hands of the receivers, that method is exclusive; since Congress intended to permit claims to be established through the ordinary local judicial machinery, although their payment must be decreed by the federal court alone, especially in a case where the decree makes no provision that the method therein provided is exclusive and assures all the creditors that their claims, whether established or not at the time of the sale of the property, shall be paid.

3. EVIDENCE — COMPETENCY OF TAX DEED. Under section 132 of the Tax Law (L. 1896, ch. 908) a tax deed executed by a county treasurer, which has for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, is admissible in evidence without proof of the regularity of the proceedings upon which it is based.

Baer v. McCullough, 72 App. Div. 628, affirmed.

(Argued June 24, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 27, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Bacon and *Joseph Merritt* for appellants. The exception to the admission of the tax deed in evidence was well taken. (*Gardner v. Heart*, 1 N. Y. 528; *Van Inwegen v. P. J., etc., R. R. Co.*, 34 App. Div. 95; *Sinclair v. Field*, 8 Cow. 543; *Beekman v. Bigham*, 5 N. Y. 366; *Thompson v. Burhans*, 61 N. Y. 52; *People v. Turner*, 117 N. Y. 227.) It was not competent for the Supreme Court of the state of New York to continue or to permit the continuance of any action against the defendants as receivers appointed by the Circuit Court of the United States after that court had terminated the receivership and removed and discharged them as such receivers. (1 U. S. R. S. Supp. 614, § 3; *F. L. & T. Co. v. I. C. R. R. Co.*, 2 McC. [U. S.] 181; *Jessup v. W., etc., R. R. Co.*, 44 Fed. Rep. 663; *Thompson v. M. P. R. R. Co.*, 93 Fed. Rep. 384; *De Groot v. Jay*, 30 Barb. 483; *Higgins v. Wright*, 43 Barb. 461; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *James v. J. C. Co.*, 8 N. Y. S. R. 490; *Peale v. Phipps*, 14 How. [U. S.] 368; *Barton v. Barbour*, 104 U. S. 126; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340.)

Frank S. Anderson and *John F. Anderson* for respondent. The exception to the admission of the tax deed in evidence was not well taken. (L. 1896, ch. 908, § 132; *People v.*

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Turner, 117 N. Y. 227.) The defendants not having had the Erie Railroad Company substituted in their stead, the case properly proceeds against the original parties. (*Hegewisch v. Silver*, 140 N. Y. 414.)

PARKER, Ch. J. While defendants were receivers of the property of the New York, Lake Erie and Western Railroad Company they allowed an accumulation of inflammable material upon its property and near its tracks, which was set fire by sparks from a locomotive. The fire spread to the adjoining property of plaintiff, occasioning him substantial damage. The accumulation of combustible material was in violation of statute, and the jury found defendants guilty of negligence, and fixed the damages at a sum for which judgment was entered, with costs, and subsequently affirmed by the Appellate Division.

It is urged in this court, as it was in the courts below, that, inasmuch as there is no personal liability on the part of the receivers, it was error to deny defendants' motion upon the opening of the trial, that the court proceed no further with the action because defendants were no longer receivers, having discharged the duties of their trust, and been discharged by the court after a sale of the property pursuant to decree. As the learned counsel for defendants now states it, the receivers having terminated their receivership, any action or legal proceeding against them was necessarily terminated, and it was not competent for the Supreme Court of the State of New York to continue or permit the continuance of any action against defendants as receivers appointed by the Circuit Court of the United States after that court had terminated the receivership and discharged them.

The action was brought against defendants while they were receivers, and in full possession of the property, and it was properly brought under that provision of the Revised Statutes of the United States which authorizes the bringing of actions, without previous leave of the court, against a receiver appointed by a federal court in respect to any act or transac-

tion of his in carrying on the business connected with such property.

After the action was at issue but before trial the railroad property was sold pursuant to a decree of foreclosure and sale. But such decree expressly provided that "The purchaser or purchasers shall as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the same and receive the deed therefor upon the express condition that he or they or his or their successors or assigns, shall pay, satisfy and discharge any unpaid compensation which shall be allowed by the court to the receivers and any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers or which may be contracted or incurred by the receivers before the delivery of the possession of the property sold, whether or not represented by certificates hereinafter issued, and also any indebtedness or liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of the receivers * * *."

In pursuance of such sale the property was conveyed to the Erie railroad on November 14, 1895, and, necessarily, came to it burdened with the obligation imposed by the decree, to pay any judgment finally rendered in the action in favor of plaintiff. The Supreme Court would undoubtedly have substituted it in the place of the receivers had it made a motion to that end, and it may well be that had the receivers moved for a substitution of the Erie railroad it would have been granted; but the Erie railroad did not demand a substitution, to the end that it might the better protect its rights, nor did the receivers seek to relieve themselves of the burden of making a contest which, if successful, would result in a benefit to the Erie railroad, and, if unsuccessful, in an addition to its financial responsibilities.

One question, therefore, is, was plaintiff bound to bring about a substitution before he could proceed to judgment?

The answer to that question is furnished by section 756 of the Code of Procedure, which provides that "In case of a trans-

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fer of interest, *or devolution of liability*, the action may be continued by or against the original party; unless the court directs the person, to whom the interest is transferred, *or upon whom the liability is devolved*, to be substituted in the action, or joined with the original party, as the case requires." In this case the taking title to the railroad property by the Erie railroad under the decree of foreclosure operated as "a devolution of liability" upon the railroad for all valid claims against the receivers, whether growing out of contract obligations or negligence in the operation of the railroad. Hence it was proper, under that section, for plaintiff to proceed to judgment against the receivers, in view of the fact that the court did not cause the Erie railroad to be substituted in the action. This judgment, while in form one against the receivers, establishes such a liability as the Erie railroad has agreed to pay, and its agreement may be enforced by the federal court, if need be, for that court not only provided in its decree that the purchaser of the property should take title subject to all the obligations or liabilities of the receivers, but by the same decree reserved the right to enforce the payment of all such obligations in the event of the purchasers refusing to make payment after demand.

The cases cited as tending to establish a different practice are *Herring v. N. Y., L. E. & W. R. R. Co.* (105 N. Y. 340) and *N. Y. & W. U. Tel. Co. v. Jewett* (115 N. Y. 166). In *Herring's* case the action was commenced after the discharge of the receiver, while in *Jewett's* case it does not appear that the court had by the decree reserved the right to enforce the payment of the obligations of the receiver against the purchasers of the property. In *Thompson v. Northern Pac. Ry. Co.* (93 Fed. Rep. 384) the action was commenced after the receiver was discharged, and it is held that under a decree like the one in the case at bar a purchaser is a proper party defendant to an action on such a claim, being entitled to defend, and that in an action commenced after the property has been conveyed to it, and the receivers have been discharged, it might properly be made sole defendant. In that case defendant, the purchaser of the road at foreclosure sale,

objected to being made defendant, although the action was commenced after the receivers had been discharged. The trial court was of the opinion that its objection was well made and dismissed the complaint, but on the review it was held that, under the peculiar circumstances of that case, the receivers having passed out of existence, officially, before the action was begun, it was proper to commence it against the party upon which liability had devolved by reason of the terms of the decree of foreclosure and its purchase thereunder.

But it is unnecessary to examine, for the purpose of distinguishing, cases in the Federal courts, for this cause of action did not abate upon the discharge of the receivers, but continued; and the practice to be followed by the courts of this state, having jurisdiction of the original parties and of the cause of action, is provided by the legislation of this state, which, as we have seen, is to the effect that the action may continue against the receivers unless the court directs the person upon whom the liability has devolved to be substituted. The court did not so direct, as it probably would have done had the Erie railroad asked it, and so the plaintiff had the authority of our statute to proceed to judgment against the receivers.

The defendants make the further point that, assuming that the practice followed in this case would have been proper had the decree of foreclosure been made by the Supreme Court of this state, it furnishes no precedent for the conduct of that court in this case inasmuch as the decree was made by a federal court, and in such case our courts should refuse to lend aid to establish a claim against the fund after the discharge of the receivers, although the action brought for that purpose was pending at the time of such discharge. As we understand the claim of the learned counsel for defendants, our court should have said to plaintiff, True, the statutes of the United States in terms authorized you to commence the action in this court without the consent of the federal court, but notwithstanding that authorization your action must fail because the federal court has seen fit since its commencement to discharge the receivers, and has provided a method for establishing claims against the fund that was in the hands of the receivers.

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This contention is mainly founded upon a clause in the provision of the statute already referred to authorizing the commencement of a suit without leave of the federal court, which reads, "but such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed." It would be unfortunate, indeed, if two jurisdictions, both within the same territory, should work so inharmoniously, burdening the citizen with two litigations where one should suffice, and producing that multiplicity of actions which is abhorrent to the law, a result which the judges of each jurisdiction charged with the responsibility of administering the law so that its burdens shall rest as lightly as possible upon litigants will find a way to avoid unless prevented by the commands of a statute.

We find no decision construing the provisions of the statute last quoted in the light of a situation such as this, and are, therefore, unrestrained by authority from giving to it such a construction as in our judgment it requires. Clearly, the statute indicates that it was a part of the congressional scheme that the appointment of receivers of great corporations—in the case of railroads, covering hundreds and sometimes thousands of miles, with property extending through many different counties and states—should not operate to prevent parties having claims against such corporations, or against the receivers thereof, from proceeding in the courts of the neighborhood precisely as they could have done when the corporation was managing the property. And to save the citizen unnecessary expense, and the more surely to protect him in his rights, it provided, in effect, that the right to bring the action should not depend upon the will of the court appointing the receivers, and so could be brought without the consent of such court. But while Congress intended to permit the establishment of claims against the fund in the hands of the receivers to take place through the ordinary local judicial machinery, it could not, of course, tolerate an attempt on the part of such courts to take possession of so much of the fund or property in the hands of the receivers as would be necessary to the sat-

isfaction of the claims. Only one court could be permitted to operate the property, marshal the assets, decree a sale and provide for the distribution of the assets among those entitled thereto, and hence it was deemed necessary to establish the boundary line beyond which state courts could not go. Such a construction is in harmony with the decree made by the federal court in this case. True, it provided for a method by which claims against the fund could be ascertained, but it did not provide that such method was exclusive, nor do we think it could have so provided in view of the language of the statute authorizing the commencement of suits without its consent, for if it could take to itself exclusive jurisdiction to establish claims against the fund by decree made at the close of the litigation, it could also do it at the outset of the litigation, and in such case the authority conferred by statute upon other courts to take jurisdiction of actions brought against the receivers would be without effect, and, of course, the statute cannot thus be brushed aside.

The decree of the federal court in this case was made on broader lines — lines more convenient for the litigant and in harmony with the statute. It assured the creditor that his claim, whether established or not at the time of the sale of the property, should be paid and it did not attempt to take from him the right, plainly given him by the statute, to select the court most convenient to him, and it reserved to the federal court, in the interest of all the creditors, the right to proceed at the foot of the decree to make such further order as might be necessary to carve out of the property or take from the fund such sum as should be necessary to satisfy all claims established through the proper legal machinery provided either by the state or the federal government in the event that the purchaser of the property, the Erie Railroad Company, should fail to pay such claims.

Exception was also taken to the admission in evidence of a tax deed upon which plaintiff relies to establish his title. The objection made was that the deed, executed by the county treasurer of Sullivan county in his official capacity,

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was not admissible or competent to prove title without proof of such proceedings as authorized him to make the sale and make the conveyance; and defendants invoke the rule of law that where a deed is made by a public officer or by any person under a naked power uncoupled with an interest it is not admissible in evidence without proof of the facts which show the power and the right to exercise it, citing in support thereof *Sinclair v. Jackson* (8 Cow. 543); *Beekman v. Bigham* (5 N. Y. 366) and *Thompson v. Burhans* (61 N. Y. 52). They concede that by chapter 194 of the Laws of 1878 it was provided that every conveyance made by the county treasurer under such act should be presumptive evidence that the sale was regular and that all the previous proceedings were regular according to the provisions of this act, and also that by chapter 594 of the Laws of 1886, amending said section 8, it was further provided that such a deed should be conclusive evidence that the sale and all proceedings subsequent and prior thereto, including the assessment of the land, were regular and valid, but urge that both of those acts were repealed by chapter 218 of the Laws of 1888, and, hence, it was necessary for the plaintiff to establish the facts authorizing the execution of the deed so as to bring the case within the rule of the authorities cited.

This argument overlooks section 132 of the Tax Law (Ch. 908, Laws 1896) which provides that "Every such conveyance heretofore executed by the comptroller, county treasurer or county judge and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located . * * shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly given, published and served according to the provisions of all laws directing and requiring the same or in any manner relating thereto. * * *"

Before this court in *People v. Turner* (117 N. Y. 227) it was argued that a similar statute was unconstitutional, but it was held that the effect of the statute was to change the rule of evidence as it existed at common law, and also to vary the existing rules relating to the limitation of time for the commencement of legal proceedings which is within the power of the legislature, and, therefore, the act was valid.

This provision of the Tax Law, the validity of which is sustained by *People v. Turner*, fully justifies the ruling of the trial court in admitting the deed in evidence without proof of the regularity of the proceedings upon which it was based.

The judgment should be affirmed, with costs.

O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ., concur; MARTIN, J., absent.

Judgment affirmed.

MARY ANN ADAMS et al., as Executors of WALTER ADAMS,
Deceased, Respondents, v. GEORGE ELWOOD, Appellant.

1. APPEAL. Rulings upon a trial, even if erroneous, unless of sufficient importance, will not justify the reversal of a judgment.

2. SAME. An objection to evidence upon which a ruling is reserved, but not made, must be treated as though it had been sustained and an exception taken.

3. EVIDENCE. Where, upon the trial of an action for an accounting, an alleged incorrectness of an inventory may have been a competent and material fact, a question simply calling upon the defendant to state whether he had explained the mistakes therein to one of the plaintiffs is properly excluded in the absence of some statement or admission on their part that would be binding upon them.

4. JUDICIAL NOTICE. An objection that a referee in an action for an accounting was disqualified because at the time of his appointment he was the county judge of a county having more than 120,000 inhabitants (Const. art. 6, § 20), cannot be sustained by the Court of Appeals where the last public record preceding his appointment shows the population to have been less than 120,000, although in fact it may have been more at the time, since in such a case that court can take judicial notice of nothing but facts authenticated by the public records.

Adams v. Elwood, 61 App. Div. 622; 72 App. Div. 632, affirmed.

(Argued June 25, 1903; decided October 6, 1903.)

N. Y. Rep.] Opinion of the Court, per WERNER, J.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 4, 1902, affirming a judgment in favor of plaintiffs entered upon the report of a referee; also from an order of said Appellate Division, entered May 31, 1901, affirming an order of Special Term denying a motion to vacate the order of reference.

The nature of the action and the facts, so far as material, are stated in the opinion.

William L. Mathot for appellant. The referee committed errors in the exclusion of testimony prejudicial to the appellant. (*Herzfeld v. Reinach*, 44 App. Div. 326; *Sharpe v. Freeman*, 45 N. Y. 802; *Lathrop v. Bramhall*, 64 N. Y. 365.) The order of reference, the reference, the report and the judgment entered upon it are wholly void, by reason of the referee's disqualification. (Const. N. Y. art. 6, § 20; *Shaw v. Tobias*, 3 N. Y. 188; 1 Greenl. on Ev. § 6; *Chapman v. Wilbur*, 6 Hill, 475; *Farley v. McConnell*, 7 Lans. 428; *Matter of Jacobs*, 98 N. Y. 98; *Sentenis v. Ladew*, 140 N. Y. 463; *Oakley v. Aspinwall*, 3 N. Y. 547; *Matter of Bingham*, 127 N. Y. 296; *Van Arsdale v. King*, 152 N. Y. 69; *Duryea v. Traphagen*, 84 N. Y. 652; *French v. Merrill*, 27 App. Div. 612.)

R. J. Shadbolt and *James M. Seaman* for respondents. The objections now raised by the defendant as to the jurisdiction of the referee are untenable. (*Blake v. Lyon*, 77 N. Y. 626; 23 App. Div. 86; *Sentenis v. Ladew*, 140 N. Y. 466.)

WERNER, J. This action was brought to compel a surviving partner to render an accounting. Plaintiffs' testator and the defendant had for many years been partners in a botanical drug business in the city of New York, when the firm was dissolved on the 1st day of March, 1895, by the death of Walter Adams, one of the partners. The action was tried before a referee. The complaint alleges, and the referee has found,

that after the death of Adams the defendant Elwood continued the business down to the time of the commencement of this action in December, 1899, and refused to wind up the partnership affairs, or to render an account although he was asked to do so by the plaintiffs.

Defendant's answer sets forth an alleged agreement between the plaintiffs and the defendant, under which the latter claimed the right to continue the business for the benefit of all concerned, he to receive a compensation of one thousand dollars per year for his services, after which the plaintiffs were to have the right to withdraw the proportionate interest in the profits to which their testator's estate should be entitled, besides such portions of the capital as should from time to time be agreed upon. The plaintiffs denied the existence of the alleged agreement and the referee has found that the defendant has failed to establish it. The referee has further found that the interest in said firm of plaintiffs' testator at the time of his death was \$7,927.03, upon which the defendant has paid \$5,588.55, leaving a balance due of \$2,338.48, which with interest amounting to \$1,325.75, entitles the plaintiffs to judgment against the defendant for \$3,664.23.

The judgment entered upon the referee's report having been unanimously affirmed at the Appellate Division, the case is now before this court subject to the constitutional and statutory limitations under which every question of fact is conclusively deemed to have been resolved in favor of the plaintiffs in the courts below. This leaves for review nothing but the exceptions to the rulings of the referee, and the appeal from the order denying defendant's motion to vacate the order of reference, which is brought up with the main appeal under the provisions of section 1316 of the Code of Civil Procedure.

Only three exceptions to the rulings of the referee are discussed by the learned counsel for the appellant. Two of them relate to the question of value of fixtures and merchandise, and the third refers to alleged errors in an inventory made by the defendant and which he claimed to have explained to one

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of the plaintiffs. The rulings upon questions of value referred to were clearly right but, even if it were conceded that they were erroneous, they are not of sufficient importance to justify a reversal of the judgment. When the defendant was asked if he had explained to the plaintiffs the alleged errors in the inventory, the question was objected to as incompetent, irrelevant and immaterial; that the defendant was incompetent to testify to the value of the fixtures; and he was bound by the inventory as it was made by himself, January, 1895, and approved by his partner, Mr. Adams, during his lifetime. The referee reserved his decision upon this objection, and no ruling thereon was subsequently made, so that it must now be treated as though it had been sustained and an exception taken. (*Lathrop v. Bramhall*, 64 N. Y. 365.)

This view of the matter does not help the appellant, however, for we think the ruling was right. The question was irrelevant and immaterial. The alleged incorrectness of the inventory may have been a competent and material fact for the consideration of the referee, but the excluded question simply called upon the witness to state whether he had explained the mistakes therein to one of the plaintiffs. It was not claimed or suggested that the plaintiff to whom the explanation is said to have been made, admitted anything in the light of, or in connection with, defendant's explanation, and in the absence of some statement or admission on the part of the plaintiffs that would be binding upon them, the naked explanation of the defendant, even if admitted in evidence, would have contained nothing material to the issue.

The referee in the case was the county judge of Queens county, having been elected to that office in November, 1897. He was appointed referee by an order entered April 10th, 1900. His report was dated October 31st, 1900. On the 21st day of March, 1901, the defendant made a motion at Special Term to vacate the order of reference, the referee's report, the judgment entered thereon and all other proceedings in the action subsequent to the order of reference, on

the ground that the court had no jurisdiction to appoint as referee any person holding the office of county judge in a county having more than 120,000 inhabitants. (Art. 6, sec. 20, State Const.) This motion was denied and the order entered upon that decision was affirmed at the Appellate Division. The appeal from that order is now before this court by virtue of the specification in the defendant's notice of appeal, that he will seek to have the order reviewed on the main appeal.

This branch of the case can also be very briefly disposed of. If the contention of the defendant as to the population of Queens county rests upon a question of fact, the adverse decision of the courts below is conclusive upon him in this court. If, on the other hand, the inquiry involves facts of judicial cognizance, then we must refer to the data in existence at the time when the referee herein was appointed. The order of reference is dated April 10th, 1900. The federal census of that year was not taken until June, and the figures relating thereto were not obtainable until later. The last enumeration of the inhabitants of the state prior to April, 1900, was that of 1892 which fixed the population of Queens county at 141,807. From these figures must be deducted the population of the towns of Hempstead, North Hempstead and Oyster Bay, which in 1899 were erected into the present county of Nassau, and which in 1892 had a population of 47,604. Deducting the population of these three towns in 1892, from the total population of Queens county in the same year, leaves to the latter county in 1892 a population of 94,203. It is probably true that there was a steady increase in the population of Queens county in all the years from 1892 to 1900, but it may be equally true that the growth of population may have been principally in the towns now forming Nassau county. There may be a moral certainty that the population of Queens county in 1900 exceeded 120,000, but in this matter we can take judicial notice of nothing but facts authenticated by public records. The last public record preceding the appointment of the referee herein is that of 1892.

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According to that record the population of Queens county was less than 120,000, and the contention of the appellant, as to the disqualification of the referee, cannot be sustained.

The judgment herein should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN and CULLEN, JJ., concur; MARTIN, J., absent.

Judgment affirmed.

JOHN B. HICKS, Respondent, v. MONARCH CYCLE MANUFACTURING COMPANY, Appellant.

1. EVIDENCE—ACTION TO RECOVER ALLEGED AGREED VALUE OF LOST PROPERTY—WHEN EVIDENCE OF EXPERT ADMISSIBLE TO SHOW THAT SUCH VALUE WAS EXCESSIVE. In an action to recover damages for the loss of property, consisting of a bicycle and models of a patented improvement thereto, received by defendant for examination at his risk and at an alleged agreed valuation, the testimony of an expert as to what it would cost to reproduce by hand a model, fashioned after the patents of the lost models, is admissible, since the question whether the sum demanded and claimed to have been agreed upon as the value of the lost property is to be regarded as liquidated damages, or merely as a penalty, is a question of intent to be deduced from the circumstances, and if the sum demanded is an unreasonable price for the property, evidence tending to show that fact is material upon the question of damages.

2. SAME—ERRONEOUS RULING EXCLUDING SUCH EVIDENCE. A ruling of the trial court, excluding such evidence, cannot be sustained upon the ground that it related only to the models and not to all of the articles in question and was, therefore, improper and immaterial; the defendant had the right to give the value of the different articles separately and, in that way, establish their total value.

Hicks v. Monarch Cycle Mfg. Co., 68 App. Div. 134, reversed.

(Argued June 15, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 4, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles A. Wendell and *Alfred W. Kiddle* for appellant. It was manifest error to exclude the testimony of Mr. Cope-land to show what it would have cost to reproduce the lost articles. (*Noyes v. Phillips*, 60 N. Y. 408; *Little v. Banks*, 85 N. Y. 266; *Scofield v. Tompkins*, 95 Ill. 190; *Ward v. H. R. Co.*, 125 N. Y. 230; *Curtis v. Van Bergh*, 161 N. Y. 47; *Gillis v. Hall*, 2 Brews. 342; 3 Parsons on Cont. [6th ed.] 156, 157; 1 Sedg. on Dam. [8th ed.] 596, 599.)

E. F. Hills and *L. A. Wray* for respondent. The measure of damages was the amount of the appraised value, \$1,000. (*Hatch v. Attrell*, 118 N. Y. 389; *Curtis v. Van Bergh*, 161 N. Y. 51; *Little v. Banks*, 85 N. Y. 258; *Kemp v. K. I. Co.*, 69 N. Y. 45; *Collwell v. Lawrence*, 38 N. Y. 71; *Ward v. H. R. B. Co.*, 125 N. Y. 230.)

WERNER, J. In this action the plaintiff seeks to recover from the defendant \$1,000.00, as damages for the failure of the defendant to return a bicycle and two models delivered to it under the following circumstances: The plaintiff was part owner of a patent upon an improved bicycle gear. During the month of February, 1898, he delivered to defendant's agents, at its salesroom in New York city, a bicycle to which was attached the patented device referred to, and also two models thereof, and left them there for the purpose of having defendant's agents examine the same with a view to inducing the defendant to adopt it upon the bicycles manufactured by it.

The plaintiff's testimony tended to show, and the jury had the right to find, that certain authorized agents of the defendant examined plaintiff's bicycle with its attachments and the accompanying models, and expressed a desire to send it to defendant's factory in Chicago for the purpose of having it there examined by experts, and that this arrangement was agreed to with the proviso that said property should be received at defendant's risk at an agreed valuation of \$1,000.00. The defendant admits the receipt of the property, the ship-

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ment thereof to its factory at Chicago, and its failure to return the same to the plaintiff, but denies that any valuation was ever agreed upon.

As part of the plaintiff's case he introduced in evidence a receipt signed by one Strout, an agent of the defendant, which was in the following form: "Recd. one bicycle from J. B. Hicks for examination and return. Value 1000.00." This receipt was signed by Strout individually, but was written on the back of a business card of the defendant indicating that Strout was the manager of defendant's New York sales department. Defendant's witnesses gave evidence tending to show that the statement as to value was not in the receipt when it was signed and that this statement had been written into the receipt after its delivery to the plaintiff.

The case was submitted to a jury and plaintiff had a verdict for \$1,000.00. The judgment entered upon that verdict was affirmed by a divided court. As there was some evidence to support the verdict the present review must be confined to questions arising upon the rulings of the trial court in the reception and exclusion of evidence. We shall limit our discussion to a single exception which we think is fatal to the judgment appealed from.

Upon the question of damages defendant called an expert in the manufacture of bicycles, and he was asked by defendant's counsel if he could tell as an expert what it would cost to reproduce by hand a model fashioned after the patent referred to. He answered in the affirmative and was then asked what it would cost. This question was objected to by plaintiff's counsel as immaterial and incompetent, "and also upon the ground that it appears that the wheel was received and the models, on the valuation of \$1000.00 by the company." The objection was sustained, and the defendant took an exception.

This evidence was clearly admissible. Whether the sum of \$1,000.00, which the plaintiff claimed had been agreed upon as the value of the articles delivered by him to the defendant, was to be regarded as liquidated damages, or

merely as a penalty, was a question of intent to be deduced from the circumstances. If the sum named was an unreasonable price for the articles, evidence tending to show that fact would have had a very material bearing upon the question of damages. The rule is that "when the stipulated sum is disproportionate to presumable or probable damage, or to a readily ascertainable loss, the courts will treat it as a penalty and will rely on the principle that the precise sum was not the essence of the agreement, but was in the nature of security for performance." (*Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230; *Curtis v. Van Bergh*, 161 N. Y. 47; 3 Parsons on Contracts [6th ed.], 157.)

The learned Appellate Division sought to uphold this ruling upon the ground that, since the question asked related only to the models and not to all of the articles in question, it was improper and immaterial. We do not concur in that view. The defendant had the right to give the value of the different articles separately and, in that way, to establish their total value. There is nothing in the form of the excluded question to indicate that defendant's counsel did not intend to adopt this method. No specific objection was taken to the form of the question in this particular, and it is only fair to assume that if such an objection had been taken, the defendant's counsel would have changed the form of his question, although we do not think that was necessary. Considering the nature of the case, the question of damages was obviously an important one, and the erroneous ruling pointed out must have injuriously affected defendant's rights.

For the reasons stated the judgment should be reversed and a new trial granted, with costs to abide the event.

MARTIN, VANN and CULLEN, JJ., concur; PARKER, Ch. J., BARTLETT and HAIGHT, JJ., dissent.

Judgment reversed, etc.

SYLVESTER WILCOX, Appellant, v. AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, Respondent.

1. EJECTMENT — GRANT OBTAINED BY FRAUD — WHEN PLAINTIFF MAY ATTACK ITS VALIDITY, ALTHOUGH NEGLIGENT IN FAILING TO READ IT. The negligence of the plaintiff in an action of ejectment against a telephone company to recover lands occupied by its poles, in failing to read an instrument executed by him under seal, granting to the defendant the right to construct and maintain its lines over and along his property, does not preclude him from attacking the validity of the paper where it appears that his signature thereto was obtained by fraud, in that he relied in signing it upon the statement of defendant's agent that the paper was a receipt for a dollar, which he wished to pay him for trimming one of his trees, and the direction of a nonsuit upon that ground is reversible error.

2. WHEN RESORT TO EQUITABLE ACTION UNNECESSARY — CONSIDERATION NEED NOT BE RETURNED. Under such circumstances the action is properly brought; the plaintiff is not obliged to appeal to a court of equity for relief against the grant, but when it is set up to defeat his claim he may avoid its effect by proof of the fraud by which it was obtained; nor is he obliged to return the dollar paid to him on its execution; the rescission of a contract induced by fraud is not attempted; the fraud charged relates, not to the contract, but to the instrument purporting to represent it.

Wilcox v. Am. Tel. & Tel. Co., 73 App. Div. 614, reversed.

(Argued June 5, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 20, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Jay K. Smith for appellant. Failure of plaintiff to read the instrument in question or to have it read to him was not such negligence as deprived him of the right to show that the instrument was obtained by mistake of plaintiff and by means of fraudulent statements made by defendant's agent. (*A. C. S. Instn. v. Burdick*, 87 N. Y. 46; *Mead v. Bunn*, 32 N. Y.

275; *De Flour v. Bowers*, 14 Abb. [U. S.] 394; *Baker v. Lion*, 67 N. Y. 309; *Dey Ermand v. Chamberlin*, 88 N. Y. 658; *Kilmer v. Smith*, 77 N. Y. 227.)

Elbridge L. Adams and *Melville Eggleston* for respondent. There was no proof of fraud impeaching the grant which entitled plaintiff to go to the jury upon that issue. (*A. C. S. Instn. v. Burdick*, 87 N. Y. 46; *Kilmer v. Smith*, 77 N. Y. 227; *Dey Ermand v. Chamberlin*, 88 N. Y. 658; *Smith v. Smith*, 134 N. Y. 62.) Assuming that the evidence of the plaintiff tends to establish fraudulent representations upon the part of the defendant, yet he cannot be heard to say that he has been deceived, for he was grossly negligent in not reading the instrument. (14 Am. & Eng. Ency. of Law [2d ed.], 115, 135; *Jaggard on Torts*, 599; *Bishop on Contracts*, § 346; 2 *Bishop's Crim. Law*, § 590; *Matter of Greenfield*, 14 Penn. St. 496; *Trambly v. Rickard*, 130 Mass. 259; *Olson v. Royern*, 77 N. W. Rep. 818; *Winchell v. Crider*, 29 Ohio St. 48; 1 *Story's Eq. Juris.* § 207; *Long v. Warren*, 68 N. Y. 426; *De Milt v. Hill*, 89 Hun, 56; *Starr v. Bennett*, 5 Hill, 303; *Taylor v. Fleet*, 4 Barb. 95; *Wood v. Gordon*, 44 N. Y. S. R. 640; *Shumaker v. Mather*, 133 N. Y. 590.)

CULLEN, J. The action was brought in ejectment to recover lands in the highway occupied by the defendant's poles, and for damages. On the trial the plaintiff proved title to the *locus in quo* and the entry thereon by the defendant and the erection of its poles. The defendant then put in evidence an instrument under seal executed by the plaintiff some years after the original entry on the highway, whereby the plaintiff in consideration of one dollar granted to the defendant the right to construct, operate and maintain its lines over and along the plaintiff's property. The plaintiff admitted his signature to this instrument, but testified that at the time of its execution he was told by an agent of the defendant that he had trimmed one of the plaintiff's trees and wished

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to pay him a dollar for it ; that the agent told him the paper was a receipt for a dollar ; that he, the plaintiff, did not read the paper, that he had not his spectacles with him, and that thereupon relying upon the statement of the agent as to its contents he signed the paper. On this evidence the court directed a nonsuit and the judgment entered thereon was affirmed by the Appellate Division by a divided court, Mr. Justice SPRING writing for reversal.

The ground on which the learned trial judge disposed of the case, as appears in the opinion rendered by him upon denying the motion for new trial, was that the negligence of the plaintiff in failing to read the paper which he signed precluded him from attacking its validity. We think no such rule of law prevails in this state, though there may be *dicta* in the text books and decisions in other jurisdictions to that effect. It was expressly repudiated by this court in *Albany City Savings Institution v. Burdick* (87 N. Y. 40), where Judge EARL said : " It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him. Where one sues another for negligence, his own negligence contributing to the injury will constitute a defense to the action ; but where one sues another for a positive, willful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief." (See, also, *Welles v. Yates*, 44 N. Y. 525 ; *Smith v. Smith*, 134 N. Y. 62.) It is true that in the opinion delivered in the *Smith* case Judge LANDON refers to the relations of confidence between the parties, but only as affecting the credibility of the plaintiff's story that she executed the instrument relying on the defendant's statements as to its contents. The decision did not proceed on any ground of trust relations between the parties. On the contrary, the learned judge said : " The learned counsel for the defendant cites numerous cases, mostly from other states, to support his contention that plaintiffs' negligence in not reading the deed defeats their appeal to equity to relieve

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them from it. The law of this state as stated in *Albany City Savings Institution v. Burdick* is not so harsh as in some of the cases cited. It does not, in cases like this, impute inexcusable negligence to that omission of vigilance and care procured by the fraud of the wrongdoer." In the other cases cited there was no relation of trust between the parties, but merely that of vendor and purchaser. In a case where a third party has parted with value on the faith of the instrument executed by a person, the question of negligence leading to the execution of the instrument might be material (see opinion of GRAY, J., in *Marden v. Dorthy*, 160 N. Y. 60), but it can have no relevancy in favor of the party who it is alleged committed the fraud. The credibility of the plaintiff's statement was for the jury; if the trial judge deemed it unreliable he might have set aside a verdict based upon it, but that did not authorize him to withdraw the case from the jury or to direct a verdict or a nonsuit. (*McDonald v. Met. Street Ry. Co.*, 167 N. Y. 66.)

The practice adopted by the plaintiff was entirely proper. He was not obliged to appeal to a court of equity for relief against the deed, but when it was set up to defeat his claim he could avoid its effect by proof of the fraud by which it was obtained. (*Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 182.) Nor was he obliged to return the dollar paid to him on its execution. The plaintiff does not attempt to rescind a contract as induced by fraud; the charge by him relates, not to the contract, but to the instrument which purports to represent the contract. In such a case the return of the consideration is unnecessary. (*Cleary v. Municipal Electric Light Co.*, 19 N. Y. Supp. 951; affirmed on opinion below, 139 N. Y. 643.)

The judgment should be reversed and a new trial granted, costs to abide the event.

O'BRIEN, BARTLETT and WERNER, JJ., concur; PARKER, Ch. J., not sitting; GRAY, J., not voting; HAIGHT, J., dissents.

Judgment reversed, etc.

ROBERT L. NILES, Appellant, v. NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY et al., Respondents.

CORPORATIONS — ACTION FOR DAMAGES RESULTING FROM CONSPIRACY TO WRECK CORPORATION MUST BE BROUGHT BY CORPORATION, NOT BY AN INDIVIDUAL STOCKHOLDER — PROTECTION OF INTERESTS OF MINORITY STOCKHOLDERS — MEASURE OF DAMAGES. The damages, resulting from an alleged conspiracy entered into by the majority stockholders of a corporation to wreck it, by refusing, through officers under their control, to accept business, so that it would be unable to pay the interest upon its funded debt, and a foreclosure would result by which creditors and the minority stockholders would be deprived of their interest in the property, belong to the corporation, not to the individual stockholders, and the latter, as such, cannot maintain an action for their recovery. Such an action must be brought by the corporation or its receiver or by any stockholder after proper demand, in behalf of the corporation and for its benefit, in order that the interest of creditors may be protected and that they may be paid out of any recovery. Assuming that the directors of the corporation in such a case would be controlled by the defendants and would work against the interests of the minority stockholders, the Supreme Court has ample power to protect such interests, and the remedy would be adequate, since the measure of damages in such an action would be the full value of the property and franchises of the corporation as it existed prior to the overt acts producing insolvency, less that which the property actually brought upon the foreclosure sale.

Niles v. N. Y. C. & H. R. R. R. Co., 69 App. Div. 144, affirmed.

(Argued June 9, 1903; decided October 6, 1903.)

APPEAL from a judgment, entered February 21, 1902, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed a judgment of Special Term sustaining demurrers to and dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis Marshall and *Nathaniel A. Elsberg* for appellant. The defendants being guilty of a breach of the duty which they owed to the plaintiff, which breach was followed by the destruction of the market value of the stock represented by him occasioning substantial damage, a cause of action in tort

to recover such damages exists in his favor against the defendants. (*Rich v. N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 390; *Graham v. Wallace*, 50 App. Div. 101.) A wrong to the plaintiff's assignors followed by damage having been committed by the defendants, a case is made out for the application of the maxim *ubi jus ibi remedium*. (*Ashby v. White*, 1 Smith [L. C.], 464; *Kujek v. Goldman*, 150 N. Y. 176; *Hoard v. Peck*, 56 Barb. 207; *Van Pelt v. McGraw*, 4 N. Y. 110; *Manning v. Monaghan*, 23 N. Y. 539; *Hubinger v. C. T. Co.*, 94 Fed. Rep. 788; *Yates v. Joyce*, 11 Johns. 136; *Like v. McKinstry*, 41 Barb. 176; 4 Keyes, 397; *Green v. Button*, 2 C., M. & R. 707; *Andrew v. Deshler*, 45 N. J. L. 167.) The fact that the plaintiff is a stockholder of the New York and Northern Railway Company, and that he might maintain a representative action in equity for redress, does not deprive him of the right of maintaining an action at law for the injury done to his property rights as a stockholder and the wrong done him as an individual by the destruction of the market value of his stock. (*Walsham v. Stainton*, 1 DeG., J. & S. 678; *Ritchie v. McMullen*, 79 Fed. Rep. 522; *Smith v. Hurd*, 12 Metc. 371; *Hanley v. Balch*, 94 Mich. 315; *Gardiner v. Pollard*, 10 Bosw. 674; *Cazeaux v. Mali*, 25 Barb. 578; *Stetson v. Faxon*, 19 Pick. 147; *Rothmuller v. Stein*, 143 N. Y. 581.)

Thomas Thacher and *Ira A. Place* for respondents. If the allegations of the complaint, taken as true, show a wrong done, it was a wrong to the Northern Company alone, and no cause of action in favor of the plaintiff arises because of an indirect injury to him or his assignors by any consequent reduction of the value of their stock. (*De Neufville v. N. Y. & N. R. R. Co.*, 81 Fed. Rep. 10; *Greaves v. Gouge*, 69 N. Y. 154; *Gardiner v. Pollard*, 10 Bosw. 674; *Alexander v. Donohue*, 143 N. Y. 203; *Flynn v. B. C. R. R. Co.*, 158 N. Y. 493; *Morgan v. R. R. Co.*, 1 Woods, 144; *Allen v. Curtis*, 26 Conn. 456; *Smith v. Hurd*, 12 Metc. 371; *Talbot v. Scripps*, 31 Mich. 268.) The complaint contains no

allegation of any wrong done to the plaintiff as distinct from the wrong committed against the corporation in which he was a stockholder. (*Allen v. Curtis*, 28 Conn. 456; *Smith v. Hurd*, 12 Metc. 371; *Talbot v. Scripps*, 31 Mich. 268; *Gardiner v. Pollard*, 10 Bosw. 674; *Greaves v. Gouge*, 49 How. Pr. 79; 69 N. Y. 154; *Brackett v. Griswold*, 112 N. Y. 454; *Wood v. Amory*, 105 N. Y. 278.)

HAIGHT, J. The demurrers interposed to the plaintiff's complaint were upon the ground that the facts stated therein were not sufficient to constitute a cause of action.

The allegations of the complaint are somewhat voluminous, but so far as they are necessary to present the question to be determined upon this review they may be summarized and stated in substance, as follows :

The plaintiff was a stockholder of the New York & Northern Railroad Company, which owned and operated a railroad from its junction with the Manhattan railway, near 155th street, in the city of New York, to a point on the New York & Harlem railroad, at or near Brewster, in Putnam county. The company had about sixty miles of railroad, with terminal facilities and other property, in the city of New York and elsewhere, of great value, which competed with the New York Central & Hudson River railroad, or roads which it controlled. Under these circumstances the defendants wrongfully, unlawfully, fraudulently and maliciously entered into a combination and conspiracy to procure for the New York Central & Hudson River Railroad Company the possession, control and virtual ownership of the property and franchises of the New York & Northern Company. Among the overt acts alleged to have taken place, in order to accomplish this result, are the following :

A majority of the stock of the New York & Northern Company was purchased by the defendants, and officers friendly to them were elected. These officers, after obtaining the possession of the company, obstructed and hampered its business by refusing traffic offered to it by other transporta-

tion companies and shippers, thus depriving it of the income which it might have received, and diverted its earnings so as to leave it without sufficient funds with which to pay the interest accruing and accrued upon its bonded indebtedness; that thereupon the defendants purchased or secured the control, by contract, of a majority of the outstanding bonds, and then procured the trustee to institute an action for the foreclosure of the mortgage given to secure the payment of the bonds. This action resulted in a sale of the property of the company to the New York & Putnam Railroad Company, who leased the same to the New York Central & Hudson River Railroad Company for a period of nine hundred and ninety-nine years, who thereupon mortgaged its property to secure the payment of bonds amounting to one hundred millions of dollars, which have passed into the hands of *bona fide* purchasers, thus rendering the plaintiff's stock of no value. He demanded judgment for the value of his stock before it was injured by the action of the conspirators.

The action is at law for the purpose of recovering the damages which the plaintiff has sustained, and is not brought for or on behalf of the corporation or of its stockholders. The question raised for review is as to whether the damages resulting from the conspiracy belong to the corporation or to the individual stockholder. In determining this question we must bear in mind that the rights of creditors are superior to those of the stockholders, who are only permitted to share in the earnings of the corporation or in the division of its assets after the claims of creditors have been satisfied.

We are thus brought to a consideration of the nature of the injury inflicted by the conspirators. Many of the overt acts alleged are lawful and justifiable when done in good faith and without any intent or purpose to harm others, as, for instance, it was lawful for defendant Morgan and his associates to purchase stock and bonds of the New York & Northern Company and to hold the same for investment or for profit. Upon the failure of the company to pay the interest accrued upon the bonded indebtedness, they had the right to petition

the trustee to foreclose the mortgage; but they had no right to enter into a conspiracy with the officers of the corporation, elected by them after they had acquired a majority of the stock, to refuse to accept traffic from other railroad and transportation companies, from which the corporation could have derived an income sufficient to pay the interest accruing upon the bonded indebtedness, or to otherwise divert the earnings of the company so as to bring it in default and permit the bringing of the foreclosure action for the purpose of cutting off the interest of the minority stockholders, or of the general creditors. The refusing of traffic and the diversion of funds operated to deplete the company's treasury and was a direct wrong to the corporation. It was an injury for which an action could have been maintained by the corporation, its receiver, if one had been appointed, or by any stockholder, after proper demand, in behalf of the company and for its benefit. In such an action the creditors are vitally interested. They have the right to have the action prosecuted on behalf of the company, so that their interests may be protected and their claims paid out of any recovery which may be obtained.

True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock, and that of the other stockholders, was in consequence of the waste and destruction of the property and franchise of the corporation. There are wrongs which if committed against a stockholder entitle him to a right of action against the person committing the wrong for the damages sustained, as, for instance, where a person had been induced to purchase stock in a corporation and pay a higher price than the stock was fairly and reasonably worth, or where the owner of stock had

been induced to part with it for a less sum than its true value, by reason of false and fraudulent representations of others with reference to its value. (*Rothmiller v. Stein*, 143 N. Y. 581; *Ritchie v. McMullen*, 79 Fed. Repr. 522.) But these wrongs are distinguishable from those against the corporation. They result in injury to the stockholder upon whom the wrong is practiced, but do not injure the other stockholders or the corporation itself. The injuries, however, in this case are not of that character. The defendants had obtained control of the affairs of the corporation through the board of directors elected by them. These directors undertook to manage the property of the corporation in good faith, according to their best judgment and skill in the interests of all of the stockholders. Having assumed the management, they were bound to use their best endeavors to prevent default in the payment of interest and the consequent sacrifice of the corporate property. Under the allegations of the complaint the directors of this corporation not only failed to discharge their duties to the stockholders, but they actively participated in the depletion of the company's treasury and in a sacrifice of the company's property, thus depriving the stockholders and the creditors of that which belonged to them.

It is suggested that the corporation is in the hands of a board of directors controlled by the defendants, and that they would work against the interest of the minority stockholders. It is also urged that the remedy of the stockholders, through the corporation, is inadequate, and that if a recovery should be had the proceeds might not reach the plaintiff, thus leaving him with a barren victory. It is doubtless true that the interests of the directors are inimical to those of the plaintiff and other minority stockholders, but the Supreme Court has ample power to protect the minority stockholders, even against the unlawful acts of the company's board of directors. It may appoint a receiver, if it has not already done so, and he may bring the action, or the plaintiff himself, where the officers of the corporation are under the control of the parties to be sued, may bring the action in his own name, but in the right

of the corporation, making it a party defendant. (*Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493-508.) As to the suggested inadequacy of the remedy, we apprehend there is no trouble. If the defendants conspired with the officers of the company to improperly deplete its treasury and thus render the corporation insolvent, in order that a sale might be made upon a foreclosure judgment, and the stockholders and creditors thus deprived of their interest in the property, we see no reason why the damages recoverable may not be for the full value of the property and franchises of the corporation as it existed prior to the overt acts complained of producing insolvency, less that which the property actually brought upon the foreclosure sale. This would afford full protection to all concerned. It would indemnify the creditors, and if the stock of the company was actually worth thirty-five dollars, or any other sum, per share, it would restore to the stockholders the property of which they have been deprived, or compensation therefor.

While the case of *Flynn v. Brooklyn City R. R. Co.* (*supra*) differs widely in its facts from the case under consideration, the principle involved is quite similar. In that case VANN, J., in delivering the opinion of the court, says, with reference to the subject we have under review, that "While courts cannot compel directors or stockholders, proceeding by the vote of a majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise. Where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts may interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action *by the corporation*, or, if it refuses to act, *by a stockholder in its stead for the benefit of all the injured stockholders.*"

In the case of *Farmers' Loan & Trust Co. v. New York*

& *Northern Ry. Co.* (150 N. Y. 410) we reversed the judgment of foreclosure referred to in the complaint in this action. In the trial of the foreclosure action in that case the trial court excluded the evidence offered to the effect that the officers of the company had declined to accept traffic from other roads, and had diverted its money. It was because of the exclusion of this evidence that the judgment was reversed, thus in effect holding that had the facts appeared as claimed in the offer they would have established a good defense in equity to the action. It now appears that a sale of the company's property, under the foreclosure judgment, had taken place before the reversal of the judgment. But it would seem to logically follow that if the matter excluded constituted a defense which the corporation could avail itself of, the damages resulting would also belong to the corporation. (See, also, *Leslie v. Lorillard*, 110 N. Y. 519-535; *Gamble v. Queens County Water Co.*, 123 N. Y. 91; *Sage v. Culver*, 147 N. Y. 245; *Hawes v. Oakland*, 104 U. S. 450.)

We think that the damages belong to the corporation and not to the individual stockholder, and that the judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; GRAY, J., not sitting.

Judgment affirmed.

CHARLES M. COHNFELD, Appellant, v. LEON TANENBAUM,
Respondent, Impleaded with Another.

GUARDIAN AND WARD—CHECK DRAWN BY GUARDIAN NOTICE TO PAYEE THAT FUND BELONGS TO WARD—FUNDS MINGLED WITH THOSE OF THE WARD BELONG PRESUMPTIVELY TO WARD—BURDEN OF PROOF. Checks drawn upon a guardian's account in which moneys belonging to a corporation of which he was the manager had also from time to time been deposited, signed by him as guardian, and given in payment of a debt due from the corporation, give presumptive notice to the payee that the funds paid him were not those of the corporation or of the drawer personally, and he is put on inquiry to ascertain the latter's authority to apply the money in payment of the debt; presumptively, all the moneys

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in the account belong to the wards, and in the absence of affirmative proof that at any time any particular sum on deposit was the property of the corporation they are entitled to recover the proceeds of the checks.

Cohnfeld v. Tanenbaum, 58 App. Div. 810, reversed.

(Argued June 15, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 18, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

George W. Weiffenbach for appellant. When a person receives from a trustee funds of the trust estate with knowledge that they are such trust funds and for a purpose foreign to the trust, he may, at the option of the *cestui que trust*, be regarded as a constructive trustee and compelled to account in equity for the funds so received, or be charged in an action at law with conversion. (*Marshall v. De Cordova*, 26 App. Div. 615; *English v. McIntyre*, 29 App. Div. 446; *Suarez v. Montigny*, 1 App. Div. 494; *Zimmerman v. Kinkle*, 108 N. Y. 282; *Gerard v. McCormick*, 130 N. Y. 261; *Wetmore v. Porter*, 92 N. Y. 76; *Fellows v. Longyer*, 91 N. Y. 324; *Anderson v. Daley*, 38 App. Div. 505; *F. Nat. Bank v. Nat. B. Bank*, 156 N. Y. 459.) The checks in suit having been drawn against and paid out of the guardianship account, it was not incumbent on the plaintiff to show specifically that all the money in the trust account was the children's. Every dollar which went into the account became impressed with the trust *eo instanti*. The burden, therefore, was on the defendant to prove affirmatively that he was entitled to the money which he received on the checks in suit. (*R. & C. T. R. Co. v. Paviour*, 164 N. Y. 281; *Marshall v. De Cordova*, 26 App. Div. 615; *Van Alen v. A. Nat. Bank*, 52 N. Y. 1; *Ferris v. Van Vechten*, 73 N. Y. 113; *Baker v. Bank*, 100 N. Y. 31; *I. & T. Nat. Bank v. Peters*, 123 N. Y.

272; *Falkland v. S. Nat. Bank*, 84 N. Y. 145; *Warren v. Union Bank*, 157 N. Y. 259; *Lathrop v. Brimpton*, 31 Cal. 117; *Shibla v. Ely*, 16 N. J. Eq. 181; *Anderson v. Daley*, 38 App. Div. 505; *English v. McIntyre*, 29 App. Div. 439.) The lower courts erred in holding that the moneys paid out to the defendant were the moneys of the company, under the rule of attributing certain drawings against certain deposits in order of time. (*Knatchbull v. Hallett*, L. R. [13 Ch. Div.] 696; *Nat. Bank v. Ins. Co.*, 104 U. S. 54; *F. S. & T. Co. v. Earle*, 110 U. S. 710.)

Sol. M. Stroock for respondent. Upon the question of notice there is nothing to charge this defendant with any liability in favor of the plaintiff or his assignors. (*Van Alen v. A. Nat. Bank*, 52 N. Y. 1; *Cavin v. Gleason*, 105 N. Y. 256; *Holmes v. Gilman*, 138 N. Y. 369; *Marshall v. De Cordova*, 26 App. Div. 615; *R. & C. T. R. Co. v. Paviour*, 164 N. Y. 281; *J. R. El. Co. v. M. Nat. Bank*, 55 App. Div. 1; *Dike v. Drexel*, 11 App. Div. 79; *Warren v. Union Bank*, 157 N. Y. 259.) Upon the proof submitted and the findings of the trial court the burden rests on the plaintiff to show that the identical moneys received by the defendant were trust moneys and belonged to the infants. (*Cavin v. Gleason*, 105 N. Y. 256; *Ferris v. Van Vechten*, 73 N. Y. 125; *Cole v. Cole*, 54 App. Div. 37; *Matter of Holmes*, 39 App. Div. 17.) Where a trustee, in violation of his trust, mingles the trust fund, not with his own money, but with another trust fund, and afterwards draws out the money by checks generally and in the ordinary manner, the first *cestui que trust* must identify the moneys so paid out as his own, and, failing to so identify them, he must resort to the moneys last deposited. (*I. & T. Nat. Bank v. Peters*, 123 N. Y. 272.) The trustee cannot, by mingling the funds of his *cestui que trust* with his own, destroy the fiduciary character of the deposit. However, this rule does not apply where the trustee mingles the trust funds with other trust funds or moneys belonging to innocent third parties. (*Van Alen v. A. Nat. Bank*, 52 N.

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Y. 1; *Cavin v. Gleason*, 105 N. Y. 256; *Holmes v. Gilman*, 138 N. Y. 369; *Blair v. Hill*, 50 App. Div. 33; *Shute v. Hinman*, 47 L. R. A. 16; Coke on Litt. 286b; Story's Eq. Juris. § 1259; *Illinois Bank v. Bank of Buffalo*, 15 Fed. Rep. 558; *Hooly v. Gieve*, 9 Abb. [N. C.] 8; *Dike v. Drexel*, 11 App. Div. 77.)

CULLEN, J. The action was brought by the plaintiff in his own right and as assignee of his brothers and sisters, children and wards of Isidore Cohnfeld, deceased, to recover from the defendant the amount paid to him by said guardian by three checks, aggregating the sum of \$1,200. The case was tried on an agreed statement of facts which is extremely meagre in its details. By such statement it appears that said Isidore was appointed guardian of said children on January 2nd, 1885. On January 1st, 1886, he had in his possession moneys of his wards amounting to \$10,355.79, and in March, 1892, he opened an account in the New York Security & Trust Company in the name of Isidore Cohnfeld, guardian, and deposited therein the sum of \$12,000. At the same time he filed with the trust company a certificate of his appointment as guardian by the surrogate of New York county. Various deposits were made to the credit of that account and checks drawn against it. No information is given as to the sources from which the moneys deposited were obtained or the purposes to which the checks drawn on the account were appropriated, except that there were from time to time some moneys of the Cohnfeld Manufacturing and Trading Company, a corporation of which the guardian was manager, deposited in the account. What those sums were or what checks were drawn against them is not stated. From the bank account it appears that on the first day of January, 1893, all the moneys had been withdrawn except a balance of \$61. In August, September and December of that year the guardian drew three checks, the subject of this action, and delivered them to the defendant in payment of claims for rent he held against the Cohnfeld Company. The guardian died in April, 1896, without having accounted

to the wards for their property. The defendant had no knowledge of the rights of the parties to the moneys paid to him except such as was given to him by the form of the checks, which were signed Isidore Cohnfeld, Guardian. On these facts the trial court rendered judgment for the defendant, which has been affirmed by the Appellate Division.

We think the courts below erred in their disposition of this case. From the extremely meagre character of the evidence it will be seen on final analysis that the determination of the case must be governed by presumptions. The signature to the check, "Isidore Cohnfeld, Guardian," gave the defendant notice that presumptively the funds being paid to him were not those either of the Cohnfeld Manufacturing Company or of Isidore Cohnfeld personally, and he was put on inquiry to ascertain the authority of Cohnfeld to apply the money in payment of the company's debt. (*Gerard v. McCormick*, 130 N. Y. 261.) This proposition is conceded by both the courts below. Had he made the inquiry he would have learned the facts which have already been stated. He is, therefore, chargeable with all that those facts import or which is fairly to be inferred from them. It is to be noted that the parties did not admit nor did the court find that at the time at which the checks in suit were drawn there was a dollar of the moneys of the Cohnfeld Company remaining in the account, nor are there any facts admitted or found from which such an inference can be drawn. The finding is that moneys of the company were deposited in the account and payments made from the account on its behalf, but not a word as to the amount of the deposits or the amount of the payments. It is very evident that the first question to be determined is, to whom, on this state of facts, did the moneys of the account *prima facie* belong, and this question is to be decided between the plaintiff and the defendant the same as it would be between the plaintiff and the company, were that company asserting its rights to the moneys on deposit. No evidence was given by the plaintiff to show that any of the moneys of the wards were deposited in the account subsequent

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to its depletion in January, 1893, and for this reason the courts below were of opinion that the plaintiff had failed to identify the moneys paid to the defendant. But it was not necessary for the plaintiff to give evidence on the subject. The account was that of the wards or of their property. There is neither finding nor proof that the guardian embezzled the money withdrawn by him prior to January, 1893. The money may have been drawn out for investment or other legitimate purposes, and when moneys were subsequently received by the guardian from such investments it was his duty to again deposit them. But if we assume that the guardian had embezzled the money, the obligation existed to make restitution and his subsequent deposits from whatever sources received would be an appropriation of those moneys in satisfaction of his wards' claim against him. From such time they became the infants' moneys as against every one except one who claiming the moneys could show they had been wrongfully diverted. (*Baker v. New York National Exchange Bank*, 100 N. Y. 31.) In the opinion of the learned Appellate Division it is said: "It is immaterial that in this case the account was opened and continued in Cohnfeld's name as guardian. We have a mixed fund to deal with in which moneys of different parties were mingled by one occupying a fiduciary relation to both parties and the rights of these parties are to be settled upon equitable principles." We entertain a different view. We think the point on which this case turns is the name and character in which the account was opened and kept. In the absence of proof to the contrary all the moneys in that account were presumptively the property of the wards. For another party to successfully reach any part of the fund it would be insufficient to show merely that moneys of the party had been improperly placed in the account; it would be necessary to go further and to prove the amount so deposited; in other words, the burden of proof would rest on the claimant to establish just what portion of the fund belonged to him and the remainder, as to which he failed to affirmatively show title, would be awarded to the party in

whose name the account stood and to whom it presumptively belonged. As already said, there is no proof in the case that any particular sum on deposit was the property of the Cohnfeld Company.

These views dispose of the objection that the plaintiff failed to comply with the rule that to follow trust funds they must be identified. The funds in this case were identified by their deposit in the trust company to the credit of Cohnfeld, guardian. Nor do we see that the rule adopted in *Clayton's Case* (*Devaynes v. Noble*, 1 Merivale Ch. Rep. 572) has any application to this case. That rule, that the earliest draft should be charged against the earliest deposits, might apply if it appeared that the moneys on deposit were insufficient to satisfy the claims of both *cestui's que trustent*, the wards and the Cohnfeld Company; but it has no bearing on the proposition that the burden rested on the Cohnfeld Company or on the defendant, who claims under it, to establish that it had any claim on the trust fund.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and WERNER, JJ., concur.

Judgment reversed, etc.

In the Matter of the Application of LESSER BROWN, Respondent, for a Writ of Mandamus against THE SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, Appellant.

1. **BENEFIT ASSOCIATION — UNREASONABLE BY-LAWS CANNOT DEPRIVE MEMBERS OF THEIR RIGHTS.** By-laws of a mutual benefit association, in so far as they attempt to make the default or misconduct of its own agent and officer in failing to pay over moneys received for dues and assessments the default and misconduct of the members, who pay them precisely as directed therein and on account of such default deprive them of their rights as members, including a forfeiture of their insurance, are unreasonable and void, and have no effect upon the status of members in good standing.

2. **SAME.** The fact that in such a case, if a suspended member is denied reinstatement, the constitution and by-laws provide that he may appeal to

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various courts or tribunals within the association, and that no member shall be entitled to bring any civil action or legal proceeding until he shall have exhausted all the remedies by such appeals, does not debar him from any remedy or relief in the courts of this state, in a case where the obstacles to the prosecution of an appeal amount to almost a denial of justice, and where, if prosecuted, no relief would result therefrom.

Matter of Brown v. Supreme Court of Order of Foresters, 66 App. Div. 259, affirmed.

(Argued June 23, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 21, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

O. P. Stockwell for appellant. The certificate of membership and the constitution and laws constitute the contract of insurance, and the rights of all parties are to be determined thereby. (*Collins v. Collins*, 30 App. Div. 343; *Matter of E. R. F. L. Assn.*, 131 N. Y. 369; *Meyers v. Masonic Guild*, 126 N. Y. 615; *Syuchar v. W. C. Assn.*, 14 Misc. Rep. 11; *Willison v. J. & T. Co.*, 30 Misc. Rep. 198; *Sabin v. Phinney*, 134 N. Y. 428; *Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *Austin v. Dutcher*, 56 App. Div. 393; *Hutchinson v. Supreme Tent*, 68 Hun, 355; *Belton v. Hatch*, 109 N. Y. 593; *Anacosta Tribe v. Murbach*, 13 Md. 91.) The provisions in the constitution and laws of the defendant providing for an adjustment and settlement within its own body by the several tribunals therein made without litigation before the right of action shall accrue is a wise and lawful one. (*D. & H. C. Co. v. P. C. Co.*, 50 N. Y. 250; *Lafond v. Deems*, 81 N. Y. 507; *Matter of N. Y., L. & W. R. R. Co.*, 98 N. Y. 447; *Lewis v. Wilson*, 50 Hun, 166; 121 N. Y. 284; *Warner v. S. C. C. M. F. S. Ins. Assn.*, 39 N. Y. S. R. 649; *Poultney v. Bachman*, 31 Hun, 49; *McCabe v. F. M.*

Soc., 21 Hun, 149; *Spink v. C. F. Ins. Co.*, 25 App. Div. 484; *Rood v. R. P., etc., M. B. Assn.*, 31 Fed. Rep. 62; *Myers v. Jenkins*, 57 N. E. Rep. 1089.) The contention that the contract under discussion is unreasonable and void is untenable. (*Spink v. C. F. Ins. Co.*, 25 App. Div. 484; *Supreme Council v. Forsinger*, 125 Ind. 52; *Pierce v. Delamater*, 1 N. Y. 17; *Oakley v. Aspinwall*, 3 N. Y. 553; *Fry v. Bennett*, 28 N. Y. 329; *Judkins v. U. M. F. Ins. Co.*, 39 N. H. 172; *People v. St. George Soc.*, 28 Mich. 261; *Sperry's Appeal*, 116 Penn. St. 391.)

David Ruslander for respondent. The provision of the defendant's constitution that in case of disputes the members shall exhaust their remedy in the order before resorting to a court of law is unreasonable and cannot be enforced. (*Bukofzer v. U. S. Grand Lodge*, 40 N. Y. S. R. 653; *Brown v. Supreme Court I. of F.*, 34 Misc. Rep. 556; *People ex rel. v. M. M. P. Union*, 118 N. Y. 101; *Loubat v. Le Roy*, 40 Hun, 546.) The subordinate lodges are in all transactions the agents of the supreme lodge. (*Knights of Pythias v. Withers*, 59 U. S. App. 177; 177 U. S. 260; *Shunch v. G. W. W. Fond*, 44 Wis. 369; *Murphey v. Sons of Jacob*, 77 Wis. 830; *Tribe of Ben Bur. v. Hall*, 24 Ind. App. 316; *Erdman v. M. Ins. Co.*, 44 Wis. 376; *Scheu v. Grand Lodge*, 17 Fed. Rep. 214; *Barbara v. Accidental Grove, etc.*, 4 Mo. App. 429; *Watson v. Jones*, 13 Wall. 679; *Sprague v. H. P. Ins. Co.*, 69 N. Y. 129; *Whited v. G. F. Ins. Co.*, 76 N. Y. 415; *Partridge v. C. F. Ins. Co.*, 17 Hun, 95.) Constitutions and by-laws should be reasonable. (*Brady v. Cochrane*, 39 N. Y. S. R. 181; *Carton v. Father Matthew, etc.*, 3 Daly, 20; *Kent v. Q. M. Co.*, 78 N. Y. 159; *People v. McDonough*, 8 App. Div. 591; 1 Bacon on Ins. § 82)

O'BRIEN, J. The courts below have adjudged that the plaintiff or relator was entitled to a peremptory writ of mandamus commanding the defendant to reinstate the relator in

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all his rights and privileges as a member of the order of Foresters in good standing upon payment by him of such dues and assessments as have accrued since the date of his suspension and further that the relator recover his costs of the proceedings. This appeal presents the question whether the relator was entitled to that relief upon the undisputed facts.

The defendant is a foreign corporation, organized under the laws of Canada on the fraternal and mutual benefit plan, doing business in this state. The purposes of the corporation, the rules for its government and the rights, duties and obligations of the members, are embodied in the constitution and by-laws. The corporation has made a very liberal use of the power to enact by-laws, since it appears from the record that at least two hundred and fifty-eight sections were in force at the time of the several transactions out of which this controversy arises. These sections constitute an elaborate and somewhat complicated code of laws, many of which are quite drastic in their operation upon the rights of members as will presently appear. One of the primary and principal purposes of the corporation was to insure the lives of its members and to afford them assistance in case of physical disability or sickness as prescribed in the law of its creation. It is admitted that on the last day of September, 1900, the relator was a member in good standing of the organization and of one of its subordinate lodges in this state, and was insured in the defendant in the sum of \$1,000; that all his dues and assessments as a member of the order and as the holder of such insurance, which by the constitution and by-laws of the defendant he was required to pay, were fully paid up to that date. In fact there is no claim made by the defendant that the relator ever was personally in default with respect to any duty or obligation to the defendant concerning the insurance or his status as a member of the organization, but, notwithstanding all this, the defendant's contention is that he has ceased to be a member of the order and has lost all rights as such member, including a forfeiture of the insurance.

A brief review of the argument in support of this proposi-

tion is all that is necessary to the disposition of this appeal. The by-laws provide that the relator's dues and assessments were to be paid to the financial secretary of the subordinate lodge or court, as it is called, and he complied with this requirement and made the payments accordingly. But the by-laws also provide that its own officer, thus receiving the money, shall be deemed to be the agent of the member making the payment, and any default on the part of that officer to transmit the money to the principal office shall be imputed to the member, and not until the money is actually transmitted to the defendant's proper officer, at the principal office, is the obligation of the paying member discharged. In this case it appears that the financial secretary of the relator's lodge did not transmit the funds but made default in that respect. The by-laws then provide that any subordinate lodge or court, not transmitting the funds so received on the first day of the succeeding month and so continuing in default until the end of the month shall *ipso facto* be deemed to be suspended on the first day of the succeeding month. This suspension affects not only the subordinate court, as such, but the whole body of its membership and thus the innocent and the guilty are cut off from all the benefits of the association, through the default or misconduct of the defendant's own agent, and without any fault of their own.

It is true that the member may be reinstated when the default has ceased, but not unless he is able to present a certificate of good health or to pass the medical board. The relator attempted to comply with this provision but was unable to procure the certificate of good health or pass the medical examination, as his physical condition was impaired in consequence of an operation performed after he became a member and while in good standing, and so his application for reinstatement was rejected.

The constitution and by-laws provide for appeals from decisions of this character to various courts or tribunals within the order and that no member shall be entitled to bring any civil action or legal proceeding until he shall have exhausted

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all the remedies by such appeals. The tribunal of last resort of the order is called the supreme court, but it is found that no session of that body was held after the suspension of the relator and before the 30th day of January, 1901, when this proceeding was commenced, and that none could be held until the second Tuesday in April, 1902, and then in the city of Los Angeles in the state of California. It is argued that these regulations or laws debar the relator from any remedy or relief in the courts of this state. Conceding that the constitution and by-laws of the defendant are a part of the contract between the parties and the general rule that the law permits great freedom of action in making contracts, there are some restrictions placed upon that right by legislation, by public policy and by the nature of things. As this court has said in a recent case: "Parties cannot make a binding contract in violation of law or of public policy. They cannot in the same instrument agree that a thing exists and that it does not exist, or provide that one is the agent of the other and at the same time and in reference to the same subject, that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan, in fact void for usury, is not usurious, or that a copartnership, which actually exists between them, does not exist. They cannot by agreement change the laws of nature, or of logic, or create relations physical, legal or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract." (*Sternaman v. Met. Life Ins. Co.*, 170 N. Y. 13.) In so far as the defendant attempted by the enactment of by-laws to make the default or misconduct of its own agent and officer the default and misconduct of the members, who had paid their dues and assessments precisely as the regulations required, its action was nugatory. No corporation can be deemed to possess the power to visit upon its members the consequences of a default in the payment of funds by its agent and officer to the extent of excluding the members from all their rights and virtually expelling them for such reason from the organization.

The learned courts below have held that the by-laws had

no effect upon the status of the relator as a member of the order in good standing for the reason that in so far as they deprived him of the rights acquired by his membership they were unreasonable and void. We fully concur in this view of the case and in the reasons stated in support of it in the learned opinion below. The defendant had no power, under the circumstances of this case, to deprive the relator of the right to resort to the civil courts for redress, or to compel him to seek his remedies by appeal to the various judicatories erected within the order. The manner in which these courts are organized, the expense and delay involved in procuring a hearing in another and very remote jurisdiction, were obstacles that amounted almost to a denial of justice. But it is plain that such an appeal could result in no relief to the relator, since, under its own laws, the defendant could not reinstate him without the medical certificate, and it was impossible to procure that.

We think that the judgment is right and must be affirmed, with costs.

PARKER, Ch. J., BARTLETT, VANN, CULLEN and WERNER, JJ., concur; MARTIN, J., absent.

Judgment affirmed.

In the Matter of the Application of WILLIAM BROOKFIELD, as Commissioner of Public Works of the City of New York, Respondent, to Acquire Certain Real Estate for the Purpose of Protection of the Water Supply of the City of New York.

DE WITT C. SARLES, Appellant.

1. RIPARIAN RIGHTS—WHEN A DEED OF LAND BOUNDED BY, AND SURROUNDING, INLAND POND DOES NOT CONVEY THE LAND UNDER WATERS OF THE POND. Where the owner of a pond, or a portion thereof, and of the lands surrounding the same, executed and delivered to the owner of a mill site upon a river through which flowed the waters from the pond, a deed containing a description bounding all of the lands surrounding the pond owned by the grantor, followed by the words "being all the land

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on both sides of Byram River and Byram Pond that will be overflowed by the waters of Byram River and Byram Pond in consequence of the erection of a dam across said Byram River, southerly of lands hereby conveyed, of sufficient height to raise the waters in Byram Pond eight feet and two-tenths above its present level and the above-described land is conveyed * * * only for the purpose of being flowed by said pond," which deed was followed by another from the same grantor to the same grantee containing substantially the same description and provisions contained in the former deed, with the exception that it gives the right to raise the water of the pond twelve feet instead of eight; such deeds convey the land on the sides of the pond for flowage purposes only, not that of the pond itself, *i. e.*, the land bordering upon and bounded by the waters of the pond which might be overflowed by the raising of the dam, leaving the title to the land then under the waters of the pond remaining in the grantor.

2. SAME — WHEN DEED OF LAND SURROUNDING POND CONVEYS EASEMENT, OR RIGHT, TO OVERFLOW SUCH LAND WITH WATERS COLLECTED AND STORED BY DAM, LEAVING TITLE AND BENEFITS THEREOF IN GRANTOR — EFFECT OF AGREEMENT BY GRANTOR TO BUY BACK EASEMENT IF NOT USED BY GRANTEE. The ordinary and formal parts of such deeds, in terms including all hereditaments and appurtenances belonging to the land thereby conveyed, must be construed with the provision limiting the land conveyed to "all the land on both sides of Byram River and Byram Pond that will be overflowed * * * in consequence of the erection of the dam across said Byram River," and with the provision that the land is conveyed "only for the purpose of being flowed by said pond," which provisions are the essential features, the real essence of the contract, and should be given force and effect in preference to such formal parts; so construed, the deeds conveyed to the grantee a mere easement to have the waters collected by the dam overflow such land, leaving the fee, possession and use thereof, in connection with the upland, in the grantor, subject only to such right of flowage; and a subsequent provision of such deeds that in case the grantee should not use the land thereby conveyed for flowage purposes, then the grantor, his heirs and assigns, should buy back such lands at a price to be agreed upon, or settled by arbitration, is not a condition subsequent to the revesting of the title in the grantor, but is a mutual agreement of the parties which could be enforced by either and does not affect the question as to the interest or title conveyed by the deeds.

3. SAME — CONDEMNATION OF RIGHTS OF OWNERS OF WATERS OF INLAND POND AND RIGHTS OF OWNERS OF LAND SURROUNDING THE POND AND UNDER WATERS OF THE SAME IN PROCEEDING BY CITY OF NEW YORK UNDER CHAPTER 189 OF LAWS OF 1898 — WHEN OWNER OF BED OF POND ENTITLED TO SUBSTANTIAL DAMAGES THEREFOR. Where the city of New York, in a condemnation proceeding instituted under the statute

(L. 1893, ch. 189), providing for the protection of the sources of its water supply, has acquired the right of the grantee named in the deeds in question to maintain the dam across Byram river and use the waters collected and stored therein, and has also acquired from the successor in title of the grantor named in such deeds the title to the lands surrounding Byram pond, for which the commissioners of appraisal awarded substantial damages, but awarded only nominal damages for the bed of the pond, he is entitled to a new appraisal awarding him substantial compensation for his right to use the pond in connection with the upland for domestic purposes, the harvesting of ice, etc., and also for his right to repurchase his interest in the lands surrounding the pond as provided for in the deeds, since such rights are real, entitling him to substantial damages upon their being taken from him, pursuant to the provisions of the act under which the condemnation proceedings were instituted.

Matter of Brookfield, 78 App. Div. 520, reversed.

(Argued June 2, 1903; decided October 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 21, 1903, which reversed an order of Special Term setting aside a portion of the report of commissioners of appraisal.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

James Dunne for appellant. The grants to Josiah Wilcox by the latter's deeds were simply grants of dry land for the express purpose of being flooded by the waters of Byram pond, and did not carry with them the fee to any part of the bed of the pond. (*French v. Carhart*, 1 N. Y. 96; *Mott v. Mott*, 68 N. Y. 246; Gould on Waters [3d ed.], §§ 199, 200, 319.) The language of the description of the Lyon's deeds, "all the lands on both sides of Byram river and Byram pond that will be overflowed" in raising the waters of the pond twelve feet above the natural level, does not embrace title to the bed of the pond. (*Child v. Starr*, 4 Hill, 369; *Starr v. Child*, 5 Den. 590; *Halsey v. McCormick*, 13 N. Y. 296; *K. C. F. Ins. Co. v. Stevens*, 87 N. Y. 287; *Holloway v. Southmayd*, 139 N. Y. 390; *Deering v. Reilly*, 167 N. Y. 184; *Clarkson*

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Points of counsel.

v. *Hathaway*, 15 Johns. 447; *Nostrand v. Durland*, 21 Barb. 478; *Roberts v. Baumgarten*, 110 N. Y. 380.) Title to the bed of the pond has not passed to Josiah Wilcox, or his successor in interest, either (1) by way of adverse possession under color of title, or (2) by prescriptive right of easement under the qualified fee granted by John N. Lyon and Samuel Augustus Lyon. (*Gillespie v. Broas*, 23 Barb. 370; Gould on Waters [3d ed.], §§ 333, 334, 340; *Smith v. City of Rochester*, 92 N. Y. 463.) The easement in favor of Wilcox to use the bed of the pond was a simple right to use such bed as a means of support for the additional twelve feet of water superimposed thereon by reason of flooding the lands so granted. (Lewis on Em. Dom. § 441; *Village of Olean v. Steyner*, 135 N. Y. 341.) The rights of the city under the Wilcox deeds to maintain the waters of Byram pond twelve feet above their original level did not deprive the owners of the bed of the pond of their right to compensation for the taking of such bed. (*City of Syracuse v. Stacey*, 169 N. Y. 231.) De Witt C. Sarles was entitled to have his interest in the bed of Byram pond valued upon a consideration of all the uses for which such pond was adapted and available; that is, all the uses to which it might be put by any one. The uses which he or his grantors had been, or at any time thereafter might be, capable of making of the property was a wholly unimportant consideration. (*Boom Co. v. Patterson*, 98 U. S. 403; *G. F. Mfg. Co. v. U. S.*, 16 U. S. Ct. Claims, 160; 112 U. S. 645; *Matter of N. Y., L. & W. Ry. Co.*, 27 Hun, 116; *College Point v. Dennett*, 5 T. & C. 217; 2 Hun, 669; *Matter of Gilroy*, 85 Hun, 424; *Little Rock Junction v. Woodruff*, 49 Ark. 381; *Hyde Park v. W. T. Co.*, 117 Ill. 233; *S. D. L. & T. Co. v. Nagle*, 70 Cal. 33; *S. P. Water Works v. Drinkhouse*, 92 Cal. 548; *Snauffer v. Ry. Co.*, 105 Iowa, 681.)

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Henry T. Dykman* of counsel), for respondent. The only estate which was left in John N. Lyon and Samuel A.

Lyon, their heirs and assigns, was the possibility of repurchase or reverter. This cannot be assigned, particularly in view of the fact that no nonuser is alleged and the purpose of the original deed is being literally pursued. (*Craig v. Wells*, 11 N. Y. 315; *Lyon v. Hersey*, 103 N. Y. 264; Gould on Waters [3d ed.] 588.) The conveyances to Wilcox through which the city derives its rights vested in the grantee an absolute fee subject to a condition, not a limitation, that the lands conveyed should be used for the purpose of raising the waters of Byram pond. (*Lyon v. Hersey*, 103 N. Y. 264; *Upington v. Corrigan*, 151 N. Y. 143; *Underhill v. S. & W. R. R. Co.*, 20 Barb. 455; *Fonda v. Sage*, 46 Barb. 109; *Towle v. Remsen*, 70 N. Y. 312; *Nichol v. N. Y. & E. R. R. Co.*, 12 N. Y. 121.) The city of New York was the owner of the fee of the old bed of the lake. (*Smith v. City of Rochester*, 92 N. Y. 463; *Gouverneur v. Nat. I. Co.*, 134 N. Y. 355; *Deuterman v. Gainsborg*, 9 App. Div. 151; *Hazelton v. Webster*, 20 App. Div. 177; 161 N. Y. 628.) Even if there remained some right of ownership in the grantors to Wilcox and his associates a nominal award for the old bed of the pond is justified. (*Sweet v. City of Syracuse*, 129 N. Y. 316.)

HAIGHT, J. This proceeding was instituted by the commissioner of public works of the city of New York on behalf of the city, under the provisions of chapter 189 of the Laws of 1893, to acquire title to Byram pond, a non-navigable body of water in the town of North Castle, Westchester county, and to the lands surrounding the same. The commissioners of appraisal, appointed in the proceeding, made their report, in which they awarded to the claimant Sarles substantial damages for his lands surrounding the pond, but only awarded him one dollar nominal damages for the bed of the pond. Objection was filed by him to so much of the report as awarded him only nominal damages for the bed of the pond. The Special Term sustained the objection and ordered a new appraisal as to the lands embraced within the pond, and, in

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other respects, confirmed the report. The Appellate Division reversed so much of the order of the Special Term as granted a new appraisal, and confirmed in full the original report of the commissioners.

In the year 1864 one Josiah Wilcox was the owner of a mill on Byram river, through which flowed the waters from Byram pond, and John N. Lyon was the owner of the pond, or of a portion thereof, and of the lands surrounding the same. Under date of June 28th, 1864, John N. Lyon executed and delivered to Josiah Wilcox a deed, which was recorded in the office of the register, Westchester county, in liber 441 of Deeds, page 298, in which the premises conveyed are described as follows: "All that certain piece or parcel of land situate lying and being in the Town of North Castle, County of Westchester and State of New York bounded and described as follows, viz.: Southerly by lands of Ebenezer G. Platt, westerly by land of the party of the first part, northerly by lands of Samuel Augustus Lyon and easterly by land of the party of the first part being all the land on both sides of the Byram River and Byram Pond that will be overflowed by the waters of Byram River and Byram Pond in consequence of the erection of a dam across said Byram River, southerly of lands hereby conveyed of sufficient height to raise the waters in Byram Pond eight feet and two tenths above its present level, and the above described land is conveyed by the party of the first part to the party of the second part only for the purpose of being flowed by said pond, and in case the party of the second part should not use said land for the purpose above named then the party of the first part his heirs and assigns shall buy back the land hereby conveyed at such price as may be agreed upon between the parties to these presents and in case of a disagreement between the parties, then each shall choose a disinterested person as umpire and the two shall choose a third person and the three persons thus selected shall fix a price on the land which shall be binding between the respective parties to these presents, their heirs and assigns. Together with all and singular, the tenements, hereditaments

and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," and so on, following the usual form of the ordinary printed deed, and concludes with a covenant to the effect that the party of the second part may within two years from that date purchase an additional quantity of land surrounding the pond sufficient to raise the dam three feet higher upon paying one hundred dollars per acre therefor. Wilcox apparently availed himself of the provisions of this covenant, for a second deed, bearing date the 12th day of October, 1864, recorded in liber 549 of Deeds, page 351, was executed by Lyon to Wilcox, which conveys all the land that will be overflowed, being about two acres, by the waters of Byram river and Byram pond, by the erection of a dam of sufficient height to raise the water in Byram pond twelve feet above the present level of the pond. This deed contains substantially the same description and provisions contained in the former deed, with the exception that it gives the right to raise the water of the pond twelve feet instead of eight feet. The city of New York has acquired the rights of Wilcox in the premises, and the claimant, De Witt C. Sarles, has succeeded to the title of John N. Lyon.

It becomes important, in the first place, to determine who is the owner of the pond. If the city of New York is the owner, then these proceedings were unnecessary, and the nominal award of one dollar should not have been made. Both parties claim under John N. Lyon, and it, therefore, becomes important to determine the construction that should be given to his two deeds to Wilcox. In describing the land conveyed, it is stated in the deeds as "being all the land on both sides of Byram River and Byram Pond." It may be conceded that where a tract of land is conveyed by deed, described by metes and bounds, that the title to any lake or pond included within the boundary lines passes with the uplands to the purchaser. It may also be conceded that the conveyance of land along a highway, stream or pond in which the description runs to the highway, stream or pond, the title

to the center of such highway, stream or pond will ordinarily be held to have passed under the grant. But when the boundary line is along the side, the edge, the border or the margin of a highway, stream or pond, the parties will be held to have intended to limit the lands conveyed to that within such boundary, and not to that which constitutes the bed of such highway, stream or pond. As, for instance, "along a stream" means along the center or thread of the stream, while "along the shore of the stream" means along the edge or margin of the stream. In the case under consideration the deed conveys the land on the sides of the pond, and not that of the pond itself. It is the land bordering upon the waters of the pond which may be overflowed by the raising of the dam, and not the lands under the waters of the pond already overflowed. It appears to us that the fair and reasonable construction of the language used in the deed would exclude from the conveyance all the lands within the pond, leaving the title thereto in the grantor. (*Child v. Starr*, 4 Hill, 369; *Starr v. Child*, 5 Den. 599; *Halsey v. McCormick*, 13 N. Y. 296; *Holloway v. Southmayd*, 139 N. Y. 390-413.)

It is now contended that even though the bed of the pond was not included in the conveyance to Wilcox, the conveyance did vest in Wilcox, in fee, a strip of land surrounding the pond, by which Lyon cut off his right of access to and possession of the pond. This brings us to a more minute consideration of the deeds. The formal parts of the deeds are those in ordinary use, containing apt words for the conveyance of the fee to the lands described. They include all the hereditaments and appurtenances thereto belonging, as well as the rents, issues and profits. But when we find provisions in a deed which are inconsistent, the rule is well settled that those provisions which are written or are unusual, or those which have received special attention, will be deemed to express the intention of the parties rather than the printed or formal portions of the instrument.

John N. Lyon owned a farm of two hundred acres which he had purchased from Samuel A. Lyon two years before.

In his deed to Wilcox he commences by describing his whole farm, giving the boundaries, and then he limits the amount intended to be conveyed, with the clause, "being all the land on both sides of Byram River and Byram Pond that will be overflowed by the waters of Byram River and Byram Pond in consequence of the erection of a dam across said Byram River, southerly of lands hereby conveyed of sufficient height to raise the waters in Byram Pond eight feet and two tenths above its present level, and the above described land is conveyed by the party of the first part to the party of the second part *only* for the purpose of being flowed by said pond." It is thus apparent that but for the provision above quoted, the title of Lyon's whole farm passed to and vested in Wilcox. But the provision limiting the grant to the lands on both sides of the pond overflowed by water, is inconsistent with the provision describing the whole farm as conveyed. So also is the provision that the lands are conveyed "*only* for the purpose of being flowed by said pond" inconsistent with the other provisions of the deed, which would ordinarily be construed as passing a fee to the land. These clauses are the prominent and noticeable provisions of the deed. They are its essential features, the real essence of the contract, and evidently they are the result of the deliberate thought and agreement of the parties and express their intention. We, therefore, think they should be given force and effect in preference to the usual formal provisions appearing in the deed.

The fee is the greatest interest that can be granted in real estate. It includes title, the right of possession and the right to use for any purpose which may be lawful. The limiting of the use and purpose of the land conveyed to that *only* of being flowed by the waters of the pond prohibits the purchaser from making any other use of it. It does not even give him the right of possession. He may erect the dam of the height specified and he may have the waters collected overflow the land, but this is the extent of his rights. This does not constitute a fee. At most it is but a mere easement, leaving the title, possession and use to the grantor, subject only to the

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right of flowage created by the deed. The circumstances of this case are not unlike those which may be found on nearly every stream or river throughout the country in which there flows sufficient water to turn a wheel. Mills and mill dams are very numerous, and many grants for the right of flowage have been made by upper riparian owners, and yet not a case has been called to our attention in which it was ever held or claimed that such a grant carried the fee. Our construction of the provision of these deeds is not only sustained by, but is strengthened by the circumstances surrounding the parties at the time they were executed. Wilcox was a millowner upon Byram river, below the pond. He was seeking additional power with which to operate his mill. He first procured the right, by the first deed, to erect a dam eight and two-tenths feet high; then about three months thereafter, probably before he had completed the construction of the dam, he procured the further right, by the second deed, to erect the dam twelve feet high. There was no reason why he should go to the expense of acquiring the title to the bed of the pond, or of the fee of the land surrounding it. His purpose was fully satisfied by acquiring the right to construct the dam of that height and have the waters collected flow back upon the lands of his grantor. In the case of *Stevens v. Kelley* (78 Maine, 445) it was held that the owner of a mill dam on an unnavigable stream, who does not own the bed of the stream above the dam, has only a qualified interest in the flow of the water, and the upper riparian owner has the right to possession, use and occupation, subject to the easement of the millowner's right of flow, and that the riparian owner is the owner of the ice which forms upon the pond and has the exclusive right to harvest the same.

It is contended that the provisions in the deeds to the effect that in case Wilcox should not use the lands for the purposes mentioned, Lyon, or his heirs and assigns, "shall buy back the lands hereby conveyed," creates a condition subsequent, in which a fee may vest. Of course a condition subsequent embraced in the deed does not prevent a vesting of the fee,

but this is upon the assumption that a fee was intended to be conveyed. If no fee was intended there could be none to vest. But is it a condition subsequent? There is no forfeiture provided for or any re-entry authorized upon the happening of such event. It is merely a mutual agreement of the parties, of Wilcox to sell and of Lyon, or his heirs and assigns, to buy back that which had been conveyed to Wilcox, upon a price to be agreed upon or settled by arbitration. Wilcox had the right to demand that Lyon should take the same, as well as Lyon had the right to insist upon his right to purchase. The covenants were mutual and could be enforced by either. But whether it may be a condition subsequent or not, it does not appear to us to affect the main question considered as to the interest that the parties intended to convey by the deeds in question.

Upon the argument of this appeal there was an elaborate discussion as to the rule of damages that should be adopted. We do not deem it necessary at this time to enter upon a discussion of that question. The conclusion which we have reached is that the deeds to Wilcox did not convey to him the fee to the lands above the dam, but that it did convey the right to maintain the dam and to flow the waters collected therein upon the land that would be covered thereby; that, subject to this right, Lyon remained the owner of the fee, to not only the bed of the pond but to the lands covered by the flowage, with the right to the possession and use in connection with his upland, which were not inconsistent with the right of Wilcox to the use of the water as the exigencies of his business might require, and that among the uses retained by Lyon was that of supplying himself and family with water for domestic purposes, the harvesting of ice, etc. The city of New York, as we have seen, has acquired Wilcox's right to maintain the dam and to use the waters collected and stored therein. For this Lyon has already received a compensation in the consideration given for the deeds. Sarles is not, therefore, entitled to recover damages therefor. But he had the right to use the pond in connection with his upland for the

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purposes stated, together with the right to repurchase the interest conveyed, as provided for in the deeds; and these rights are real, entitling him to substantial damages upon their being taken from him, pursuant to the provisions of the act under which these proceedings were instituted.

We, therefore, conclude that the order of the Appellate Division should be reversed, that of the Special Term affirmed, and that the costs in this court and in the Appellate Division should be awarded to the appellant; the other costs in the proceeding to abide the final award of costs.

BARTLETT, J. (dissenting). The deeds to Wilcox, in my opinion, conveyed the absolute fee of the premises described subject to a condition subsequent.

No particular form of words is necessary to create a condition subsequent, but the cases hold it must be clearly expressed. (*Lyon v. Hersey*, 103 N. Y. 264; *Uppington v. Corrigan*, 151 N. Y. 143.)

The premises in question were to be used for flowage purposes, and the deeds provide if not so used then the grantor, his heirs and assigns, "shall buy back the land hereby conveyed at such price as may be agreed upon between the parties to these presents." A clause then follows for umpires to fix price if parties fail to agree.

It is a little difficult to comprehend how grantors can "buy back" land unless title passed under their conveyance.

I vote for affirmance.

PARKEB, Ch. J., O'BRIEN and WERNER, JJ., concur with HAIGHT, J.; GRAY and CULLEN, JJ., concur with BARTLETT, J.

Order reversed, etc.

LEANDER BRINK, Respondent, v. WILLIAM D. STRATTON et al.;
Appellants.

1. EVIDENCE—COMPETENCY OF FACTS SHOWING HOSTILITY OF WITNESSES. Testimony of a party as to the hostility of witnesses called to impeach him is competent for the purpose of affecting their credibility.

2. RELIGIOUS BELIEF OF WITNESS. A witness cannot be interrogated as to his belief in the existence of a Supreme Being, who would punish false swearing, for the purpose of affecting his credibility.

Brink v. Stratton, 64 App. Div. 331, reversed.

(Argued June 16, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 17, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Abram F. Servin and *Thomas Watts* for appellants. The court erred in refusing the testimony of Corey offered to show bias in witnesses called to impeach him. (*People v. Brooks*, 131 N. Y. 321; *Lamb v. Lamb*, 146 N. Y. 317; *Schultz v. T. Ave. R. R. Co.*, 89 N. Y. 242; *People v. Mather*, 4 Wend. 229.) The question allowed as to Corey's religious belief and the charge of the court upon that point were erroneous. (*Stanbro v. Hopkins*, 28 Barb. 265.)

William Vanamee and *John F. Bradner* for respondent. The rulings upon the testimony as to Corey's bad character were correct. (*Gale v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 594.) The questions asked Corey as to his regard for the sanctity of an oath and the charge of the court upon this subject were proper. (*Stanbro v. Hopkins*, 28 Barb. 267; 1 Rice on Ev. 548, 549; *Free v. Buckingham*, 59 N. H. 225; *People v. Braun*, 158 N. Y. 569; *G. W. T. Co. v. Loomis*, 32 N. Y. 127; *LaBeau v. People*, 34 N. Y. 230.)

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Opinion of the Court, per MARTIN, J.

MARTIN, J. This action was to recover upon a joint and several promissory note made by the defendants Stratton, Brown, and the firm of Corey & Co., of which Corey is surviving partner. It was payable to the plaintiff or his order. The defendants Stratton and Brown answered the complaint, and, among other defenses, alleged that the note in suit had been paid by the defendant Horace W. Corey or the firm of Corey & Co. The defendants' evidence was to the effect that it had been paid by giving another note made by Corey & Co. alone which was discounted at a bank, renewed from time to time, and ultimately taken up and paid by the plaintiff. That it was received in payment by the plaintiff was denied by him, and that issue was submitted to the jury which found a verdict in his favor. The judgment entered upon the verdict was unanimously affirmed by the Appellate Division, so that the only questions which are presented upon this appeal arise either upon rulings rejecting or admitting evidence, or, upon exceptions to the charge of the trial court.

The first error alleged by the appellants is the refusal of the court to permit the defendant Corey to testify as to the relations between himself and three witnesses, Stivers, Boyd and Wilbur, who were called on the trial to impeach his character for truth and veracity. As to the witness Stivers he was asked: "While you were publishing a paper and he was publishing one were you good friends? [Objected to as improper. Objection sustained. Defendants except.]" As to the witness Boyd he was asked: "Was Mr. Boyd opposing you and you opposing Mr. Boyd for a number of years in your papers? [Objected to as improper. Objection sustained. Defendants except.] Q. Each one attacking the other through the paper? [Same objection, ruling and exception.]" As to the witness Wilbur he was asked: "What have been the relations between you and Mr. Wilbur? [Objected to. Objection sustained. Defendants except.] Q. Was Mr. Arthur (Wilbur) at one time superintendent of schools? A. He was. Q. Did your paper attack him? [Objected to. Objection sustained. Exception.] Q. I will ask you whether or not by

reason of the position of the 'Forum' against Mr. Wilbur, whether or not he was defeated as superintendent of the schools? [Objected to. Objection sustained. Exception.]”

That it was competent to prove the hostility of any or all of these witnesses towards the defendants or either of them by their cross-examination or by other testimony; that it was not necessary that the witness should be first examined as to his hostility before calling other witnesses, and that the examination of other witnesses is not limited to contradicting him in case he denies hostility, is well established by the decisions in this State. (*Starks v. People*, 5 Denio, 106; *People v. Brooks*, 131 N. Y. 321; *Garnsey v. Rhodes*, 138 N. Y. 461, 467; *People v. Webster*, 139 N. Y. 73, 85; *Lamb v. Lamb*, 146 N. Y. 317.)

In *People v. Brooks* it was held that the hostility of a witness towards a party against whom he is called may be proved by any competent evidence, either by cross-examination of the witness or by the testimony of other witnesses; and that it is not necessary that the witness should first be examined as to his hostility before calling other witnesses, and the examination of other witnesses is not limited to contradicting him in case he denies any hostility. The extent, however, to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent, at least, within the discretion of the trial judge. It should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issue in the case cannot be properly suspended to make out a case of hostile feeling by mere circumstantial evidence from which such hostility or malice may, or may not, be inferred. (*Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242.) The decision in the *Brooks* case was followed in *Garnsey v. Rhodes*, *People v. Webster* and *Lamb v. Lamb*.

In the *Garnsey* case a witness was asked whether there had been any disagreement between him and the plaintiff's architects, between whom and the plaintiff a conspiracy was alleged. The evidence was objected to and excluded. This was held error and the court there said: "The object of the defense

was to charge the plaintiff with the consequences of a conspiracy between him and the architects, and it was, therefore, quite as material and important for the plaintiff to show that the witness by whom it was sought to establish the unlawful combination was hostile to one of the parties to it as it would have been to have shown hostility on his part towards the plaintiff himself. The admission or rejection of the evidence was not discretionary with the trial court." "It was not there (in *People v. Brooks*) held, as the counsel for the defendant seems to suggest, that it was in the discretion of the court, whether such questions should be allowed. All that was said upon the point was that the *extent* to which such an examination may go must be in some measure within the discretion of the trial judge. This must be so or else it might become interminable. But here the whole inquiry was ruled out. Even general questions were disallowed, and, as it must be assumed, for the purposes of this appeal, that if answered, the responses would have shown bias, the plaintiff may have been prejudiced by the exclusion of the evidence."

If Corey is to be regarded as a party to this action, then clearly within the doctrine of that case the evidence offered by the defendants as to the relations between Corey and the witnesses called was admissible. It will be remembered that the witness was asked as to Stivers whether he and Stivers were good friends while publishing opposition papers. As to Boyd the inquiry was if they were opposing each other for a number of years in their papers, and as to Wilbur he was asked what had been the relations between them. All these questions were objected to as improper and the objection was sustained. Corey was named as defendant in the summons and complaint, but did not appear either in person or by attorney. He was, however, called as a witness by the defendants and gave material testimony upon the trial. The three witnesses mentioned were called to impeach his character for truth and veracity and testified that it was bad. Corey was then recalled and the proof as to the hostility of those witnesses to him was offered and excluded. Thus the ques-

tion presented is whether the defendants were entitled to prove the relations between those witnesses and Corey as affecting their evidence as to his general character. We think they were. The question of his character was thus placed in direct issue. To that issue the evidence rejected was plainly directed, and the proof offered was admissible within the principle of the cases already cited, especially the cases of *Starks v. People* (5 Denio, 106), where it was held that a party has a right to impeach a witness for his adversary, though the testimony of such witness related solely to the general character of another witness, and *Garnsey v. Rhodes*, where the hostility which was sought to be proved was between the architects employed by the plaintiff and the principal witness for the defense. In this case the direct purpose of the evidence was to show that the witnesses who had testified to the bad character of Corey were hostile to him, the party against whom they had testified, and, hence, their evidence was not entitled to the credit it otherwise would have been and was, we think, plainly admissible.

The next exception urged by the appellants is to the rulings of the court rejecting the evidence of the defendant Corey as to whether he was financially responsible at the time the note which was put in the bank was delivered to the plaintiff. The issue was whether the note in suit had been paid by the delivery and acceptance of a note made by Corey & Co. That question in the case depended upon the direct evidence of the parties, and even if the defendant Corey was financially responsible, it is hardly evidence that the plaintiff would have surrendered a note upon which there were two other makers who were responsible, even if the defendant Corey was. We think this exception is insufficient to justify an interference with the judgment.

The only remaining exceptions that need be considered are whether the court properly overruled the defendants' objection to the plaintiff's question whether the witness Corey believed in the existence of a Supreme Being who will punish false swearing, and to the charge of the court upon that

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evidence. The question was objected to as improper, immaterial and irrelevant. The objection was overruled and the defendants excepted. The answer was: "I do not know anything about it I am sure. * * * I will reply that I am an agnostic. I have no belief on that subject at all. I do not know anything about it." The court in charging the jury said: "It is for you to say how far you are to attach credibility to his (Corey's) statements, how far his testimony is impeached as to what he has said here in regard to his religious beliefs." This charge was excepted to by the defendants. That question is not an open one in this court. In *People v. Most* (128 N. Y. 108) it was directly involved and distinctly decided. One of the points made by the appellant's counsel in this court was that "The court erred in permitting the district attorney to interrogate each witness for the defense as to his religious belief, and in not stopping the district attorney in his summing up to the jury when he said that the jury should not believe the defendant and his witnesses because some of them testified that they did not believe in the Supreme Being." At the threshold of his opinion in that case Judge ANDREWS stated that "But three of the questions presented on the brief of the appellant's counsel can be considered on this appeal. One of these questions is raised by the exception to the denial by the trial judge of the motion of the counsel for the defendant, made at the conclusion of the evidence on the part of the People, for an instruction to the jury to acquit the defendant on the ground that the evidence was legally insufficient to justify a conviction. An exception was taken to a question put to a witness by the defendant on cross-examination by the prosecuting officer and which was allowed by the court, as to his belief in a Supreme Being. A third exception was taken to evidence offered by the prosecution and admitted, that the persons present at the meeting at Kramer's Hall on the evening of November 12, 1887, were anarchists."

After discussing the first and third questions the court held that the evidence was sufficient to bring the case within the defi-

dition of the statute, and that the proof that the persons present at the meeting at Kramer' Hall were anarchists, was properly admitted. As to the second exception, which was to the question as to the witness' belief in a Supreme Being, the court said: "The exception to the question put to the witness on cross-examination as to his belief in a Supreme Being is frivolous." Thus it is perfectly manifest that the question whether it was competent to interrogate a witness as to his belief in a Supreme Being was directly involved and squarely decided by this court in that case. It is also manifest that if a contrary view had been taken upon that question, which was certainly presented, it would have required a reversal of the judgment, and, as the judgment was unanimously affirmed, it is plain that the question was passed upon in that case. Therefore, unless our decision in that case is to be overruled, the judgment in this case cannot be reversed upon that ground.

We are, however, of the opinion that the court erred in rejecting the evidence of the witness Corey as to the hostility of the impeaching witnesses, and for that error alone the judgment should be reversed.

CULLEN, J. I concur in the opinion of Judge MARTIN that the trial court erred in not permitting the defendant, when examined as a witness on his own behalf, to testify as to the state of the relations existing between himself and several witnesses for the plaintiff. But there was further error committed on the trial. On cross-examination the defendant Corey was asked, against the objection and exception of his counsel, whether he believed in the existence of a Supreme Being who would punish false swearing, to which he replied that he knew nothing about it; that he was an agnostic and had no belief on the subject at all. In submitting the case to the jury the learned County Court charged: "It is for you to say how far you are to attach credibility to his (Corey's) statements, how far his testimony is impeached as to what he has said here in regard to his religious beliefs," to which comment

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and instruction the appellants excepted. I think that these rulings also were erroneous.

At common law no one but a Christian was a competent witness, and, as testimony could be given only under the sanction of an oath, even Christians (such as Friends and others) who deemed the taking of an oath unlawful were necessarily excluded from testifying. The common-law rule was relaxed from time to time, either by statute or by judicial decisions, until as the law stood in this state prior to the adoption of the Constitution of 1846: "Every person believing in the existence of a Supreme Being who will punish false swearing, shall be admitted to be sworn, if otherwise competent." (2 R. S. 408, § 87.) And it was further enacted by the legislature that "no person shall be required to declare his belief in the existence of a Supreme Being, or that he will punish false swearing, or his belief or disbelief of any other matter, as requisite to his admission to be sworn or to testify in any case. But the belief or unbelief of every person offered as a witness may be proved by other and competent testimony." (Id. 408, § 88.) It was immaterial whether the witness believed that Divine punishment would be inflicted in this world or in the next. (1 Greenl. Ev. § 369.) Though it seems that prior to the legislation referred to the rule was to the contrary and it was necessary that the witness believe in a future state of rewards and punishments. (*Jackson v. Gridley*, 18 Johns. 98; *Butts v. Swartwood*, 2 Cowen, 431.) But by the Constitution of 1846 there was added to the previously existing constitutional declaration of religious liberty the further provision: "And no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." This amendment, of course, established the competency of an infidel or an atheist as a witness. As to this there is no dispute. But it is contended that though the witness may not be excluded from testifying by reason of being an infidel, he may be interrogated as to his belief, and his infidelity be considered by the jury on the question of his credibility. This was so held by the Supreme Court in *Stanbro v. Hopkins*

(28 Barb. 265), though the declaration was obiter, the judgment having been reversed on another point. The same view was taken by this court without discussion in *People v. Most* (128 N. Y. 108). The question has arisen in other states. In Iowa the rule in the *Stanbro* case seems to have been adopted. (*Searcy v. Miller*, 57 Iowa, 613; *Stole v. Elliott*, 45 id. 486.) On the other hand, in Virginia and in Kentucky, under constitutional provisions not as explicit as our own, but enacting liberty and equality of religious belief, it has been held that a witness cannot be interrogated as to his belief in the existence of a Deity or a future state for the purpose of affecting his credibility. (*Perry v. Commonwealth*, 3 Grattan, 632; *Bush v. Commonwealth*, 80 Ky. 244.)

The record of the proceedings of the convention by which this constitutional provision was formulated shows that the view taken by the Virginia and Kentucky courts is the correct one. The provision was the subject of discussion and debate and was not adopted without opposition. The member who introduced the provision (Mr. Taggart, of Genesee) said that he had known the question of a witness's belief in a Supreme Being being raised but once, and trusted that he should never see it raised again. But, he said, if there was anything in this, "let it go to the jury; let it go to his credit and not to his competency." Acting on this suggestion another member moved an amendment: "But evidence may be given as to the belief or disbelief of the witness in the obligation of an oath and of the grounds of such belief or disbelief, in order to enable the jury to judge of his credibility." This amendment was rejected by a vote of 92 to 12. (Crosswell & Sutton Debates, pp. 808, 809.) It may be worthy of notice that the convention at the same time struck out the provision of the then existing Constitution which disqualified ministers from holding office, thus making the divorce between the state and religious creeds complete.

Therefore, upon the adoption of the Constitution of 1846 by the people, a witness could not be excluded by reason of his religious belief or unbelief, nor under the statute

could he be interrogated on that subject. The learned court in the *Stanbro* case said with entire truth that though a witness may be competent his credibility may be impaired. It then argued that in analogy to the case of a party to an action who is now a competent witness, but whose interest in the cause goes to his credibility, so the religious belief of a witness, while not rendering him incompetent, might be considered on the question of the credit to be accorded him. I think the learned court was misled by a false analogy. Interest in the subject-matter and relationship to the parties are temporal and mundane influences which common experience teaches us tend to bias consciously or unconsciously the testimony of witnesses. But such is not naturally the result of abstract religious belief. I think that the decision of this court in *Gibson v. Am. Mutual Life Ins. Co.* (37 N. Y. 580) is controlling on that question. That was an action on a life insurance policy, one of the defenses being suicide. Evidence offered by the defendant to show that the insured was an atheist was excluded. The ruling of the trial court was upheld on the ground that a man's probable course of action could not be predicated from his religious belief. It was there said by Judge HUNT: "In what way, and how far do these statements of belief operate upon the conduct of man? Is it certain that he who believes in the eternal punishment of the impenitent, in a future world, is a better observer of the laws of his country, and more free from actual crime, than he who denies that doctrine? Or is it certain that he who believes in the final salvation of all men would refrain from an offense which he would have committed had he believed that there was no future state? No man can answer with certainty." The truth of this statement is apparent when it is borne in mind that at all times men have been found to unflinchingly meet death rather than deny their religious faith, who could not be induced to conform their lives to the commands of that religion for a week continuously. All that was written by Judge HUNT in the case cited applies with far more force to the case before us. The light

in which suicide was viewed by Pagan ethics differs widely from the judgment passed on that act by the Christian religion. While there were not wanting philosophers or moralists in the old world to condemn the act, they were the exceptions. But the Christian religion declared that suicide was a "mortal" sin, and there can be no doubt that it is due to belief in that religion that a practice once common has substantially ceased, though sporadic instances still occur. (See 1 Lecky European Morals, 233 *et seq.*) Indeed, one of the grounds of attack on Christianity by the great apostle of modern pessimism is what he contends to be its false view of suicide. (Schopenhauer's Essays.) The argument was, therefore, not without force, that an infidel or an atheist would be more likely to commit suicide than a Christian. But I know of no system of religion or code of ethics at any time generally prevalent in the world that has failed to condemn falsehood or to hold truth as a virtue.

It has been seen that in the condition of the law just prior to 1846 the only religious view that excluded a witness was failure to believe in Divine punishment. Thus fear was deemed the only influence by which veracity in witnesses could be assured. If, despite the constitutional enactment that no such test of competency shall longer prevail, inquiry on the subject is still to be made with reference to the witness' credibility, I think we may be led into great embarrassments. I do not see why a witness who declares merely his ignorance as to whether there is or is not a Deity who will punish false swearing is less amenable to fear than one who believes that his future state, whether of salvation or punishment, has been decreed from all eternity regardless of faith or good works. Yet the denomination holding this doctrine in its confession of faith has given to American history at least as many great names as any other religious sect. I think that the learned court in the *Stanbro* case failed to appreciate that when the Constitution abrogated all disqualifications from office or civil rights, the consideration of a witness's religious belief on the question of his credibility necessarily fell at

the same time. On the trial of a cause, as is pointed out by the Supreme Court of Virginia, the judge may be a skeptic or an infidel and the juror an agnostic or an atheist; neither can be excluded for that reason from sitting in judgment. Is it possible that we would uphold the submission to a jury of a witness's belief in Christianity as impairing his credibility?

It is said by one of the learned judges in the *Stanbro* case with reference to the practice of interrogating a witness as to his religious belief: "I have no fears that this rule will encourage parties to scandalize truly religious witnesses by imputations that they profess the worst of creeds. For so long as no religious test shall be required for judges and jurors, parties will be loath to cross-examine witnesses as to their opinions on matters of religious belief unless they are well assured the opinions of the witnesses are very obnoxious to the sentiments of citizens who say with Pope:

'For modes of faith let graceless zealots fight,
He can't be wrong whose life is in the right.'

That which the learned judge considered a safeguard against the abuse of the practice, to me constitutes its danger. Doubtless, no wise advocate will interrogate a witness as to his religious faith unless it is obnoxious and unpopular in the community. But that is the very case in which the exposure of a witness's religious belief would probably lead to injustice. It is somewhat singular that shortly after the adoption of the Constitution of 1846 abolishing all religious tests or disqualifications, religious animosities, it is true not standing alone, but connected with questions of race and nationality, reached the highest pitch ever known in this country, not only affecting the action of political parties, but leading in many cases to riot and the destruction of property. I think that no one who remembers that period will deny that during the prevailing prejudice and passion a witness professing the unpopular faith might have found himself, in some parts of the country, as much discredited by a jury, or some members of it, as an agnostic or atheist would now be. It is true that the feelings then existing have entirely or almost entirely subsided. It is also

true, as said by Bacon, that a religion of negation only is not apt to draw to itself many or enthusiastic adherents, and it may be added that for this reason it is not likely to excite the most violent antipathies. But the principle involved here is in itself important, and the rule declared by the court, in my judgment, wrong. Unfortunately, religious animosities are easily aroused, and we should not give sanction to a principle that may hereafter work great injustice.

I do not say that no examination into a witness's religion can at any time be had. The religious creed of a person may not deal exclusively with his relations to his Creator, but may enjoin acts forbidden by law or forbid compliance with the law. The weight of authority seems to be that the Thugs in India committed their crimes under the direct sanction if not command of their religion. Of course, a witness may be interrogated as to whether he thinks it wrong to give false testimony, whether his religion requires him to commit a crime. These inquiries relate to temporal matters, not to spiritual or theological ones. So also a witness may be asked whether he is a member of the same church as that of one of the parties. This also involves no direct inquiry into his religious belief, but only as to his associations. Experience teaches us that we may be biased in favor of our associates, whether in a church, in a club or in a business institution. Possibly the most "obnoxious" religious faith to-day is that of the Mormons. In a prosecution for polygamy a witness might properly be asked whether he was a Mormon, and whether his religion did not enjoin or, at least, approve that practice. But when a Mormon sues on a bill for groceries, in my judgment it is neither constitutional nor reasonable to interrogate him on the subject of his belief for the purpose of exciting prejudice against him.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

BARTLETT, HAIGHT, VANN and WERNER, JJ., concur with CULLEN, J., who agrees with MARTIN, J., as to ground for reversal; PARKER, C. J., concurs with MARTIN, J., fully.

Judgment reversed, etc.

DENNIS WALSH, Respondent, v. CENTRAL NEW YORK TELEPHONE AND TELEGRAPH COMPANY, Appellant.

1. NEGLIGENCE—WHEN CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT. A bicyclist riding after dark between two rails of a railroad track upon a public street in which a trench was being excavated about three feet from the track, along which a manhole was constructed extending to within a foot of the track, which street was closed upon that side by barricades upon which at intervals red lights had been placed, who, in order to avoid another bicycle and a car upon the other track coming from the opposite direction, turns out and, attempting to proceed upon the strip between the track and the trench, falls into the manhole and is injured, is not as matter of law guilty of contributory negligence.

2. DEGREE OF CARE. Ordinary care or precaution to avoid danger must be commensurate with the danger and will dictate and require a degree of vigilance under one set of circumstances that would be unnecessary under another. A refusal to charge, therefore, upon the trial of an action to recover damages for the injury, that the red lights and the dirt thrown up in the excavation of the trench indicated that there was danger, and that the plaintiff was bound to exercise unusual care in passing that locality, and that by unusual care was meant greater care than would be required in passing over a street without obstacles and in which excavations did not appear, constitutes reversible error.

Walsh v. Central N. Y. Tel. & Tel. Co., 75 App. Div. 1, reversed.

(Argued June 25, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 23, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edwin Nottingham for appellant. The evidence fails to show any negligence on the part of defendant, and its motion for a nonsuit on that ground should have been granted. (*Nolan v. King*, 97 N. Y. 565; *Thieme v. Gillen*, 41 Hun, 443; *Parker v. City of Cohoes*, 10 Hun, 531; 74 N. Y. 610; *Lane v. Wheeler*, 35 Hun, 606.) There is no evidence that plaintiff exercised any care in passing along the street, and

the evidence shows that he was guilty of negligence which contributed to his injury, and he should have been nonsuited on these grounds. (*Weston v. City of Troy*, 139 N. Y. 281; *Morgan v. Vil. of Penn Yan*, 42 App. Div. 582; *Bowen v. City of Rome*, 23 Wkly. Dig. 406; *Davenport v. B. C. R. R. Co.*, 100 N. Y. 632; *Cummins v. City of Syracuse*, 100 N. Y. 637; *Splittorf v. State*, 108 N. Y. 205; *Whalen v. C. G. L. Co.*, 151 N. Y. 70; *Williams v. Vil. of Port Leyden*, 62 App. Div. 490; *Belton v. Baxter*, 54 N. Y. 245; *Albring v. N. Y. C. & H. R. R. R. Co.*, 46 App. Div. 460; *Dubois v. City of Kingston*, 102 N. Y. 219.) The trial court erred in its charge to the jury and in its refusals to charge as requested by defendant, and for these errors the judgment should be reversed. (*City of Richmond v. Leaker*, 99 Va. 1.)

James Devine for respondent. Defendant was guilty of negligence. (*Thurber v. H. B., M. & F. R. R. Co.*, 60 N. Y. 331; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 141; *Chisholm v. State*, 141 N. Y. 246; *Isham v. Post*, 141 N. Y. 100, 107; *Lane v. City of Syracuse*, 12 App. Div. 118; *Donnelly v. City of Rochester*, 166 N. Y. 315; *Deming v. T. R. Co.*, 169 N. Y. 1; *Snowden v. Town of Somerset*, 171 N. Y. 99.) The plaintiff was not guilty of contributory negligence. Whether or not he was guilty was a question of fact for the jury. (*Greany v. L. I. R. R. Co.*, 101 N. Y. 419; *Kettle v. Turl*, 102 N. Y. 255; *Weber v. Railroad Co.*, 58 N. Y. 453; *Eastland v. Clark*, 165 N. Y. 420; *Snowden v. Town of Somerset*, 171 N. Y. 99.) The trial court did not err in its charge to the jury and in its refusal to charge, as requested by the defendant. (*Morehouse v. Yaeger*, 71 N. Y. 594; *Fay v. O'Neil*, 36 N. Y. 11; *Ruloff v. People*, 45 N. Y. 213; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 379; *Kellogg v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 76; *Griffen v. Manice*, 166 N. Y. 191.)

CULLEN, J. The action was brought to recover for damages for personal injuries. At the time of the accident the

defendant was engaged in laying a subway or conduit in South Salina street, in the city of Syracuse. The street runs north and south, and in the middle of it is laid a double-track street railroad. For the purpose of laying the conduit the defendant had excavated at a distance of about three feet west of the westerly rail a trench two feet in width and varying in depth from two and a half to three and a half feet. At points along the line of the subway manholes were to be constructed. The one in question, into the excavation for which the plaintiff fell, was about six feet wide, east and west, and nine feet long, north and south. The easterly side or line of the manhole was a little more than a foot from the westerly track. The earth taken from the trench was cast on its westerly side so as not to obstruct the movement of the street cars, the running boards of which projected from a foot and a half to over two feet beyond the rails at a height of fourteen inches above the pavement. The part of the carriageway lying to the west of the railroad tracks was closed by barricades. The carriageway to the east of the tracks, in width eighteen feet, was wholly unobstructed. On the night on which the accident occurred red lights were placed at the barricades and also along the ridge of earth thrown out from the trench. About half-past eight the plaintiff and his brother were proceeding on bicycles southerly along the street, the plaintiff riding between the two rails of the westerly track, his brother in the space between the two tracks. They encountered another bicycle and a car proceeding north on the easterly track. Thereupon the plaintiff turned out of the south-bound track to the three-foot strip between the trench and that track in order, as he testified, to permit the brother to take his place in that track and avoid the approaching vehicles. They continued on their way at a speed of about four miles an hour until they reached the manhole into which the plaintiff fell and was injured. The plaintiff testified that he had noticed the excavation of the trench, but that he had observed there was a strip of three feet between the trench and the track which, in his judgment, was sufficient for him to safely pro-

ceed on his bicycle; that he did not see the manhole or that at that point the excavation approached closely to the track and that there was no light or barrier at that point to give him warning. At the trial the defendant contended that it could not place any barrier or lights on the easterly side of the trench on account of the projection and overhanging of the running boards of the cars and also that the plaintiff was guilty of contributory negligence in running his bicycle so close to the trench. The motion for a nonsuit was denied and the case submitted to the jury, which rendered a verdict for the plaintiff. The Appellate Division by a divided court affirmed the judgment entered on that verdict.

Personally I should incline to the view that the plaintiff in riding at night so close to the excavation or trench without being driven to assume that position by any special stress of circumstances was guilty of contributory negligence as a matter of law. Doubtless in the absence of any information or notice to the contrary the traveler has a right to assume that all parts of the highway are reasonably safe and secure, but every traveler equally well knows that for very many purposes it is necessary from time to time to tear up and obstruct streets, by which the streets or portions of them are rendered unfit for travel. In such cases it is necessary that barriers, lights and other appropriate warnings should be given by which the traveler is made aware of the condition of the street. The plaintiff saw the barriers and lights, saw that the westerly portion of the carriageway was closed to travel, and that a trench was being excavated through the street at a distance of three feet from the rail. I do not think he had the right to assume that there would continue to be a space of three feet between the trench and the rail. Every one knows that the side of a trench is not maintained with the regularity that is to be expected in a face of masonry. The earth is apt to cave in to a certain extent, and, therefore, the width of the trench cannot be expected to be uniform, but necessarily varies. It is also well known that riding or walking close to the edge of a trench tends to make

it cave in. It was dark and the plaintiff could not see the condition of the street any great distance before him. Knowing, therefore, that the street was torn up and appreciating his inability to see its state at any great distance it seems to me that ordinary care would have kept him off that side of the carriageway unless he was forced on to it by the movement of other vehicles, which was not the case. There was no reason why he and his brother should necessarily have ridden abreast. One could have preceded the other in the space between the rails with entire safety. But a majority of my associates think the question of the plaintiff's negligence was one of fact for the jury, and I bow to their judgment. We all agree, however, that there was error in refusing to charge the defendant's request as to the degree of care which the plaintiff was bound to exercise under the circumstances. The defendant asked the court to charge that the red lights and the dirt thrown up in the excavation of a trench indicated that there was danger; that the plaintiff was bound to exercise unusual care in passing that locality, and that by unusual care was meant greater care than would be required in passing over a street without obstacles and in which excavations did not appear. This the court refused to charge, but left it for the jury to say whether the plaintiff should have exercised a greater degree of care. It is true that the obligation resting on the plaintiff was the exercise of ordinary care, but at the same time the general rule is that care, or, more accurately, precaution, must be commensurate with the danger, and ordinary care will dictate and require a degree of vigilance under one set of circumstances that would be unnecessary under another. (Thompson on Negligence, sec. 171; *Griffen v. Manice*, 166 N. Y. 188.) It is on this principle that the rule of law has become settled in this state that because a railroad crossing is a place of danger travelers seeking to cross must make vigilant use of their senses to avoid danger. Assuming that I am wrong in the view that the danger here was so manifest that it was negligence for the plaintiff to proceed on the side of the carriageway upon which

was the excavation, it was at least sufficiently obvious to require of him to exercise special care. We think that the defendant was entitled to have that proposition specifically charged.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN and WERNER, JJ., concur; MARTIN, J., absent.

Judgment reversed, etc.

WILLIAM A. TAYLOR, Appellant, v. ROBERT H. THOMPSON
et al., Respondents.

1. FALSE REPRESENTATIONS — ACTION FOR DAMAGES WILL NOT LIE BETWEEN MEMBERS OF TWO FIRMS HAVING ONE MEMBER COMMON TO BOTH. One induced by the false representations of a member of a firm to purchase the interests of his copartners and take their place in a new firm, to be composed of himself and such partner, cannot individually maintain an action against the firm to recover the damages alleged to have resulted therefrom; nor can it be maintained by the new firm, since an action at law for deceit will not lie between members of two firms having one member common to both. If any cause of action exists, the rights of the parties must be adjusted by a court of equity.

2. WHEN FIRM NOT LIABLE FOR FALSE REPRESENTATIONS OF PARTNER. Where upon the trial of such an action it appears that the partner making the false representations acted independently in negotiating the sale and principally and primarily for his own benefit and not as agent of the firm, his associates cannot be held liable in any event.

Taylor v. Thompson, 74 App. Div. 320, affirmed.

(Argued June 22, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 24, 1902, affirming a judgment in favor of defendants entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Austen G. Fox and *William D. Leonard* for appellant.
It was at least a question of fact for the jury whether or not

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Statement of case.

Culbert was the agent of the defendant. (*Lindmeir v. Monahan*, 64 Iowa, 24; *Lindley* on Part. 167; *Lovell v. Hicks*, 2 G. & C. 46; *Taylor v. Thompson*, 62 App. Div. 170; *Ahern v. Goodspeed*, 72 N. Y. 108; *Bradner v. Strang*, 114 U. S. 555; *Barwick v. E. J. S. Bank*, L. R. [2 Ex.] 259; *Mackay v. C. Bank*, L. R. [5 P. C.] 394; *Swire v. Francis*, L. R. [3 App. Cas.] 106; *Houldsworth v. Glasgow Bank*, L. R. [5 App. Cas.] 317; *Indianapolis, etc., Ry. Co. v. Tyng*, 63 N. Y. 653.) Culbert made false representations to plaintiff. Plaintiff relied upon them to his damage. (*Sandford v. Handy*, 23 Wend. 260; *Fairchild v. McMahon*, 139 N. Y. 290; *Townsend v. Felthousen*, 156 N. Y. 618; *Mead v. Bunn*, 32 N. Y. 280; *Simar v. Canaday*, 53 N. Y. 306; *Hadcock v. Osmar*, 153 N. Y. 608; *Rothschild v. Mack*, 115 N. Y. 7; *Kunz v. Kennedy*, 147 N. Y. 130; *Redgrave v. Hurd*, L. R. [20 Ch. Div.] 13.) The respondents received and retained all the benefits of the contract obtained by Culbert's fraud, and are bound to compensate the injured plaintiff. (*Mayor v. Dean*, 115 N. Y. 556, 561, 562; *Bennett v. Judson*, 21 N. Y. 538; *Hathaway v. Johnson*, 55 N. Y. 96; *Sandford v. Handy*, 23 Wend. 260; *Griswold v. Haven*, 25 N. Y. 595; *I. P. C. R. Co. v. Tyng*, 63 N. Y. 653; *Ins. Co. v. Minch*, 63 N. Y. 145; *Krumm v. Beach*, 96 N. Y. 398; *Jones v. Jones*, 120 N. Y. 598.)

John J. Crawford for respondents. The action cannot be maintained for the reason that it is brought upon the joint claim of Culbert & Taylor, and is based upon Culbert's own fraud. (*Medbury v. Watson*, 6 Metc. 246; *Patten v. Gurney*, 17 Mass. 182; *Prouty v. Whipple*, 10 Wkly. Dig. 387; *Mosgrove v. Golden*, 101 Penn. St. 605; *Englis v. Furniss*, 4 E. D. Smith, 587; *Yeamans v. Bell*, 151 N. Y. 230; *Bosanquet v. Wray*, 6 Taunt. 597; *Jones v. Yates*, 9 B. & C. 532; *Schnaier v. Schmidt*, 13 N. Y. Supp. 725; *Mangles v. Sherer*, 21 App. Div. 507.) Culbert was not the agent of the respondents, and had no authority to make representations on their behalf, and the appellant had notice of this

from the circumstances of the case. (*Udell v. Atherton*, 7 H. & N. 172.) The respondents are not in the position of one who has profited by the fraud of an agent, but, on the contrary, the appellant seeks through the fraud of his copurchaser to obtain the property for less than the respondents were willing to accept. (*Udell v. Atherton*, 7 H. & N. 172.)

BARTLETT, J. The plaintiff seeks to recover in this action damages by reason of alleged false representations made by the defendants upon the sale of a certain business which had been conducted by them under the firm name of Thompson, Culbert & Company. This sale took place in October, 1889, and in order to deal with the questions of law presented a history of the facts is essential.

The defendant's firm of Thompson, Culbert & Company were in October, 1889, and for years prior thereto, importers of wines and liquors at 39 Broadway, in the city of New York. The defendants John and Robert Thompson were brothers. John Thompson was seventy years of age at the time of this transaction and Robert was a very much younger man. Robert Thompson and the defendant Norris had practically nothing to do with this business except as contributors of capital, the management being left to John Thompson and the defendant Culbert. John Thompson contributed thirteen thousand dollars as capital and Robert Thompson and Norris contributed six thousand five hundred dollars each. Culbert, who was not financially responsible, furnished no capital and received one-fifth of the profits for services rendered.

The defendants Robert Thompson and Norris were at this time, respectively, president and vice-president of a corporation known as the Thompson & Norris Company, manufacturers of corrugated paper for packing purposes, and had for many years been doing business in the city of Brooklyn.

In the month of August, 1889, the members of the firm of Thompson, Culbert & Company became aware of the fact that through the dishonesty of clerks a defalcation had occurred

amounting to thirty thousand dollars, being somewhat in excess of the paid-up capital of the business. After considerable discussion the Thompsons and Norris concluded that it would be better to wind up the business, as John Thompson was advanced in years and greatly disturbed by the defalcation, and Robert Thompson and Norris had no disposition to carry on a business outside of their corporate interests, to which reference has already been made.

When Culbert was advised of the disposition on the part of his partners to wind up the concern, he stated that he would like to retain the business. The result was that Culbert's partners stated to him, in substance, that if he could raise the money so as to return to them their capital and relieve them from all obligations to the creditors of the firm, they would sell the business. Culbert thereupon had an interview with his friend, Robert E. Bonner, who introduced him to the plaintiff Taylor. Bonner was a man of means and agreed to advance to Taylor the necessary amount to purchase this business if Taylor was satisfied to enter into business relations with Culbert. After certain negotiations between Taylor and Culbert a firm was formed, under the style of Culbert & Taylor, having for its object the taking over of said business. The assets of the business were ultimately turned over to Culbert & Taylor, the defendants Thompson and Norris received their contributions of capital and were released from their obligations to the creditors of the firm of Thompson, Culbert & Company.

Taylor, in the following June, 1890, claims to have ascertained that Culbert made fraudulent representations as to the assets and liabilities of Thompson, Culbert & Company, but notwithstanding this fact continued in firm relations with him for two years thereafter. Taylor testified in this connection as follows: "When I discovered the evidence of this fraud on the thirtieth day of June, 1890, Mr. Culbert was my partner and continued to be such for two years after that time. I called his attention to the fact that he had perpetrated a fraud upon me. I did that, I think, about September of that year and continued in partnership with him after that for

nearly two years. He was a full partner and entitled to half interest. He did not draw out a full one-half. I permitted him to be there with certain rights. I had him pretty well covered. I am still carrying on the business. It has been a profitable business since I took possession of it; it was not at the time I took it."

At the expiration of these two years Culbert is said to have assigned his interest in the firm to Taylor, and on the 16th day of January, 1893, this action was commenced by Taylor, individually, naming as defendants the partners in the former firm of Thompson, Culbert & Company, including Culbert. The defendants John Thompson and Culbert were not served and have not appeared. It is also to be observed that Culbert was not produced as a witness on the trial of this action.

This action has been twice tried. The plaintiff recovered a judgment on the first trial, which was reversed by reason of errors in the charge of the trial judge.

It should also be observed that notwithstanding the fact that Culbert is said to have assigned to Taylor his interest in the firm of Culbert & Taylor, that assignment was not offered in evidence on this second trial.

The theory of the plaintiff's action apparently is, that Culbert, as a member of the firm of Thompson, Culbert & Company, fully representing them in law as their agent, made certain false representations to him in negotiating the sale of this business as to the value of the assets and the amount of the liabilities, upon which he relied, to his damage of thirty-three thousand dollars and upwards.

The main contention of the plaintiff and appellant is, that he was entitled to go to the jury on the question of what relation existed between him and Culbert during these negotiations which resulted in the sale of the business.

We are of the opinion that there are certain undisputed facts upon which the directed verdict can stand. It is true that there is a conflict of evidence as to what occurred when these parties met at the office of counsel to close matters. Robert Thompson and Norris testified that they told Taylor

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at that time and in the presence of counsel that they had nothing whatever to do with the management of this business and that they did not know what the assets of the business consisted of.

John Thompson testified on the first trial, and his testimony was read on the second trial, he having died in the interval, referring to his interview at office of counsel, as follows: "My brother got up and said, 'Mr. Taylor, we know nothing about the assets, whether they were worth ten thousand dollars or one hundred thousand dollars. We sold out to Mr. Culbert on their appraisal, and we know nothing whatever about whether they are worth anything or a good deal.'"

These statements were corroborated in the main by counsel. The plaintiff swore witnesses who denied that these statements were made.

If the case rested on this portion of the evidence it certainly should have been submitted to the jury. It, however, stands uncontradicted, as between Culbert and his partners, that he was to raise money and take over the business if he wished to continue it in connection with any third party. Culbert had been the partner of plaintiff for years and a member of a firm formed for the purpose of taking over this business, concededly, and the fact that he was not sworn at the trial, nor served in this action, permits the presumption that he could not have aided the plaintiff's case if placed upon the witness stand.

The defendants' theory of the action rests upon this uncontradicted evidence that the Thompsons and Norris wished to abandon the business upon being paid the amount of their capital, and be relieved from liabilities for the debts of the firm of Thompson, Culbert & Company; that Culbert was acting wholly in his own interest, wishing to preserve the business for himself and some third person whom he might induce to advance the necessary capital and become associated with him in the conduct of the business.

As already pointed out, this transaction took the form, so far as the papers are concerned, of a transfer from the firm of

Thompson, Culbert & Company to the firm of Culbert & Taylor. Taylor, when on the stand, testified that he took a bill of sale at the time he purchased. This is error, as there is attached to his amended complaint a bill of sale from the firm of Thompson, Culbert & Company to the firm of Culbert & Taylor.

It also appears by the dissolution agreement, whereby the firm of Thompson, Culbert & Company was dissolved, that its property, assets and good will were to be sold to Robert B. Culbert and William A. Taylor. The real transaction, without regard to the forms which the parties saw fit for convenience to adopt, is made very clear by evidence that is not disputed.

As above stated, the testimony of John Thompson, taken at the first trial, was read on the second trial, he having died meanwhile. The beginning of the transaction now before the court is therein disclosed with great clearness. He refers to the time when he first learned of the defalcation, and in that connection he testified: "I sent immediately for my brother and Mr. Norris, and they came and I told them what had happened. I think I went over to Brooklyn to see them afterwards, and we decided then and there to sell out our claim upon the partnership, and make some disposition of the business, go into liquidation and pay off the debts, and either go on with the business under some other name or retire entirely. I came back and told Mr. Culbert of it. 'Well,' he said, 'if that is so, I would like to retain the business.' Mr. Culbert said, 'Mr. Bonner, who was a friend of mine, then told me he would assist me at any time that I wanted to go into business. And if we were willing to sell out to him that he would see Mr. Bonner and see if he would furnish the money to buy out the stock.' I told him he could see him; that I was willing to sell out to him, and all I wanted was my money that I put into the firm. He asked if I would see the other two. I told him I would, and went and saw them, and in talking it over we all agreed to sell out, provided we got back the capital we put in the firm, and interest from the last of February to

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three o'clock on the day we would give them up possession. I came back and told Mr. Culbert and he said he would go and see Mr. Bonner. He went off and came back and said that Mr. Bonner told him to look the matter over, and if it was all right he would furnish him the money to buy it up. 'Now,' he said, 'if I buy this, you will stay with me for a short time, not to exceed three months, and attend to the office while I attend to the outside business, until I get some man to take care of the office,' which I agreed to do, and told him I would, provided he paid me my money and the interest, which he promised to do, if, on examination, he found the business or capital was not much depleted. * * * The terms mentioned to Culbert upon which we were to sell out, were that we were to be paid our capital and interest, and all debts of the firm, foreign and domestic, were to be provided for. This conversation was in August. * * * I first heard mention of Mr. Taylor about the last of September or the first of October. Mr. Culbert first mentioned him to me. He told me that Mr. Bonner had found a man to take charge of the office and have him take an interest in the business—a man by the name of Taylor, whom he did not know, he said, and was kind of sorry for it, because he did not know Mr. Taylor, and he might make it very unpleasant for him in the transaction of business, but he was going to be the head of the firm himself, and things had to go as he said himself; that Bonner was furnishing the money to buy the concern out."

These statements of John Thompson are corroborated by Bonner, who was sworn by the plaintiff. This witness alludes to the first interview he had with Culbert in this matter. He said: "We were lunching together, as we did once in a while, and he spoke of the defalcation, * * * and said that he was afraid, as the result of the whole thing, that he was going to be forced out of the business unless he could get capital to go in, and if he could get capital to go in he claimed that he had a very good business proposition, which would pay anybody and would take about sixty thousand dollars. That, I

think, was about the substance of the first conversation we had."

When cross-examined as to this interview, Mr. Bonner said : "The idea was that he was afraid it might be dissolved and reorganized and he left out. He did not want to be left out. He wanted to stay in. Q. And he wanted you to assist him, so that he could stay in, did he not? A. Well, he didn't put that as broadly as that, at first. Q. How did he put it? A. Well, he was just telling me his whole history, you know — his history like one friend talks to another, and he led up to it by degrees; it resulted, practically — Q. He was telling you the trouble he was in? A. It resulted in that, without absolutely saying here, 'won't you lend me this money right straight out.'"

It is clear from the uncontradicted evidence of these two witnesses that Culbert was primarily acting in his own interest, and that it was a matter of indifference to the other partners in the firm of Thompson, Culbert & Company whether the transfer was made to him or to some person who could raise the money and enter into business relations with him, or to a firm to be formed.

If we adopt the plaintiff's theory of the action, that Culbert was throughout acting as the agent of the firm of Thompson, Culbert & Company, and had made false representations which rendered himself and partners liable to the persons purchasing the business, relying upon those representations, then it is clear that this action should have been brought in the firm name of Culbert & Taylor, as they were on the face of the proceeding the purchasers of the business and received a written bill of sale, to which reference has already been made.

It is difficult to understand from the standpoint of plaintiff's theory how he can maintain this action as an individual. Assuming, therefore, that this action should have been brought by the firm of Culbert & Taylor, we are met by insuperable legal difficulties. This is an action at law to recover damages for deceit, and it is well settled that no action can be main-

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tained at law between the members of two firms having one member common to both. (*Engliss v. Furniss*, 2 Abb. Pr. 333; *Bosanquet v. Wray*, 6 Taunt. 597; *Jones v. Yates*, 9 Barn. & Cress. 532, 538.)

In *Engliss v. Furniss* (*supra*) it was held that the action would not lie, although the common partner assigned his interest in the claim to his copartners.

In the case at bar it is claimed that Culbert had assigned to Taylor any rights he had in the premises, but as above pointed out, the assignment was not offered in evidence, and if it had been it would not have added any support to this form of action.

If either the firm of Culbert & Taylor, or of Taylor individually, had any cause of action against one or more of the defendants, a judgment adjusting the rights of the various parties could only be rendered by a court of equity. (*Bosanquet v. Wray*, *supra*, at p. 605.)

It, therefore, follows, assuming the plaintiff's theory of the action to be correct, that the trial judge was justified in directing a verdict for the defendants for the following reasons: That plaintiff failed to show a state of facts supporting any action by him individually against the defendants; that the firm of Culbert and Taylor, if parties plaintiff, could not maintain this action at law against the defendant firm, Culbert being a common partner of both firms.

If, on the other hand, we assume the defendants' theory to be correct, that the undisputed facts warrant the conclusion that Thompson, Culbert & Company sold out to Culbert, agreeing to transfer the property to him, or to such person or firm as he might form, then in negotiating with plaintiff Culbert was primarily and principally acting for himself and in his own interest. This being so, and in view of the long standing business relations between the plaintiff and Culbert after the alleged fraudulent representations were discovered, according to the testimony of the plaintiff, Culbert cannot be regarded as having acted as the agent of the defendant firm, but rather as carrying on an independent negotiation, for his

own benefit, between himself and the plaintiff. The trial judge was, therefore, justified in directing a verdict for the defendants on this view of the case.

We are of the opinion that in any aspect of the case the judgment of the Trial Term and the Appellate Division should be affirmed, with costs.

O'BRIEN, VANN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., concurs in result; MARTIN, J., absent.

Judgment affirmed.

AMELIA RUSSELL, Respondent, v. THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, Appellant.

1. INSURANCE, LIFE — RESTRICTION OF POWER OF AGENTS. A life insurance company may enter into a contract with an applicant for insurance which can so fix the precise conditions under which the policy shall issue that agents, general or local, in the absence of express authority, cannot waive them.

2. WHEN PROVISION IN APPLICATION FOR INSURANCE THAT POLICY SHALL NOT TAKE EFFECT UNTIL FIRST PREMIUM BE PAID THEREON IN FULL CHARGES APPLICANT WITH NOTICE THAT AGENTS WITHOUT EXPRESS AUTHORITY HAVE NO POWER TO WAIVE IT. Where a written application for a policy of life insurance, duly signed by the applicant, provides that the application is to become a part of the contract of insurance applied for; that the policy to be issued thereunder shall be accepted subject to the conditions and agreements therein contained; that the policy "shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full," which provision is carried into the policy with due reference to the same, the applicant must be presumed, in the absence of fraud, to have read or had read to him the application before signing it, and he is thereby advised that the policy cannot issue or take effect until the first premium is paid thereon in full; the legal effect is that he covenants directly with the company, not through its agent, that the policy is not to be binding until the first premium is paid in full, and he is chargeable with notice that the agent, whether general or local, cannot, without express authority, waive such payment and deliver a valid policy.

3. SAME. Where it appears in an action brought upon such policy by the beneficiary named therein that, at the time the policy was delivered to the insured, a general agent of the company extended the time of payment of the premium for thirty days from such delivery, stating that the

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insurance would go into immediate effect, and the insured died four days thereafter, and before the premium was paid, the beneficiary cannot recover without proof of the agent's express authority to waive the payment of the first premium.

Russell v. Prudential Ins. Co., 73 App. Div. 617, reversed.

(Argued June 11, 1908; decided October 6, 1908.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 26, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

D. Raymond Cobb for appellant. The court erred in denying defendant's motion for a nonsuit. (1 May on Ins. § 144; *Allen v. G. A. Ins. Co.*, 123 N. Y. 6; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Walsh v. H. Ins. Co.*, 73 N. Y. 11; *Moore v. N. Y. B. F. Ins. Co.*, 130 N. Y. 543; *Forward v. C. Ins. Co.*, 142 N. Y. 382; *Conway v. P. L. & M. Ins. Co.*, 140 N. Y. 83; *Wilkie v. S. Ins. Co.*, 43 Minn. 177; *Dunham v. Morse*, 158 Mass. 132; *Marvin v. U. Ins. Co.*, 85 N. Y. 278; *Bishop v. A. Ins. Co.*, 130 N. Y. 496.) The court erred in holding with the plaintiff as a matter of law upon the question of Mr. Tennant's authority, of waiver, and estoppel, and in refusing to submit these questions to the jury. (*Gibson El. Co. v. L. & L. & G. Ins. Co.*, 159 N. Y. 426; *Stewart v. U. M. L. Ins. Co.*, 155 N. Y. 257; *Williams v. P. F. Ins. Co.*, 57 N. Y. 274; *Cornish v. F. B. F. Ins. Co.*, 74 N. Y. 295.) The court erred in its refusals to charge. (*Clark v. Aldrich*, 4 App. Div. 527.)

Frederick A. Kuntzsch for respondent. The general agent of the defendant had authority to waive the condition of the policy requiring payment of the initial premium as a condition precedent to its taking effect. (*Marshall v. C. T. M. A. Assn.*, 170 N. Y. 434; *Genung v. M. Ins. Co.*, 60 App. Div.

424; *Ames v. M. L. Ins. Co.*, 40 App. Div. 465; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 460; *Boehen v. W. C. Ins. Co.*, 35 N. Y. 131; *Ruggles v. A. C. Ins. Co.*, 114 N. Y. 415; *McNeilly v. C. L. Ins. Co.*, 66 N. Y. 23; *Marcus v. St. L. M. L. Ins. Co.*, 68 N. Y. 625; *Palmer v. P. M. L. Ins. Co.*, 84 N. Y. 63; 2 May on Ins. [4th ed.] §360b; *Wood v. P. Ins. Co.*, 32 N. Y. 618.) Assuming that the general agent did not have express authority to waive the condition requiring payment of the initial premium, the defendant is, nevertheless, bound by his act. (*Babcock v. Baker*, 37 App. Div. 558; *Stewart v. U. M. L. Ins. Co.*, 155 N. Y. 257; *Pechner v. P. Ins. Co.*, 65 N. Y. 196; *Bodine v. E. F. Ins. Co.*, 51 N. Y. 117; *Cross v. S. T. & L. Ins. Co.*, 58 App. Div. 602; *Flaherty v. C. Ins. Co.*, 20 App. Div. 275; *Bliss v. A. Ins. Co.*, 18 App. Div. 481; *Miller v. L. Ins. Co.*, 12 Wall. 285.) The submission to the jury of the sole question, whether or not the defendant's agent, upon delivery of the policy gave credit for the first premium, was not error. (*Skinner v. Norman*, 165 N. Y. 565; *Genung v. M. Ins. Co.*, 60 App. Div. 424; *W. T. M. Co. v. H. E. Ins. Co.*, 66 N. Y. 613; *Goodwin v. M. M. L. Ins. Co.*, 73 N. Y. 480; *Robbins v. S. F. Ins. Co.*, 149 N. Y. 477; *Boehen v. W. C. Ins. Co.*, 35 N. Y. 134; *Forward v. C. Ins. Co.*, 142 N. Y. 382.) The exceptions to the rulings of the trial court are not well taken. (*Skinner v. Norman*, 165 N. Y. 565; *Pechner v. P. L. Ins. Co.*, 65 N. Y. 195.)

BARTLETT, J. The defendant is an insurance corporation organized in New Jersey, conducting two classes of insurance, one known as the "industrial" and the other "ordinary" insurance. Under the former plan small policies are issued upon which weekly payments are paid; under the latter larger policies are issued, the premiums being payable annually, semi-annually or quarterly.

The plaintiff sued to recover on a policy issued on the life of her deceased husband under the "ordinary" plan. The defendant was represented in this state by one Charles H.

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Tennant as general agent at Syracuse. Tennant's district consisted of the counties of Onondaga, Oswego and Cortland.

It appears that at the time negotiations were opened for the policy sued on, the insured held a policy for a like amount in the defendant company, which was duly paid.

The complaint alleges that on the 30th day of December, 1899, the defendant issued the policy in suit; that on the 6th day of January, 1900, the defendant waived the payment of the first premium and extended same for a period of thirty days; that on the 10th day of January, four days thereafter, the insured was killed by an explosion.

The answer is a general denial, and also contained an affirmative defense to the effect that defendant had not insured the plaintiff's life, and that the policy alleged in the complaint never had an inception, the plaintiff not having paid the annual premium thereon, or complied with the preliminaries necessary to give it validity. The issues were tried at the Onondaga Trial Term and the jury rendered a verdict in favor of the plaintiff. The Appellate Division affirmed the judgment entered upon the verdict. No prevailing opinion was handed down, but Justice HISCOCK wrote a dissenting opinion, Justice WILLIAMS concurring.

The facts are as follows: On the 26th day of December, 1899, the plaintiff made a written application for the policy in suit. The material portions of that application read: "I hereby declare and warrant that all the statements and answers to the above questions, as well as those made or to be made to the company's medical examiner, are or shall be complete and true, and that they, together with this declaration, shall form the basis and become a part of the contract of insurance hereby applied for. And it is further agreed that the policy herein applied for shall be accepted subject to the conditions and agreements therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full," etc. This application was signed by the applicant and duly witnessed.

Upon receipt of the application the policy was sent to the general agent at Syracuse. On January 6th, 1900, the general agent, in company with a sub-agent, went to the house of the deceased and had an interview with him.

Plaintiff swears in substance that after her husband had stated his inability to pay the first premium at that time, the general agent informed him that he might have thirty days additional time in which to pay the first premium and that the insurance would go into immediate effect. The general agent and the sub-agent denied this conversation *in toto* and say that deceased was distinctly informed that the policy, as stated therein, would not go into effect until the first premium was paid in full. The receipt for the first premium was thereupon signed by the general agent and delivered to the insured and by him handed to the sub-agent, who was to hold it until the payment was actually made. This transaction as to the receipt is not disputed.

The policy contained the following, among other, provisions; it is headed, "Regarding agents." "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend time for paying the premium, to waive any forfeiture, or to bind the company by making any terms, or making or receiving any representation or information. These powers can be exercised only by the President, one of the Vice-presidents or the Secretary, and will not be delegated. Modifications, etc. No provision of this policy can be modified or waived in any case except by indorsement hereon signed by the President, one of the Vice-presidents or the Secretary."

The general agent was appointed to his position under a written contract, which is in evidence, and contains this provision, among others: "4th. It is understood and agreed that said general agent has no authority on behalf of the Prudential Insurance Company of America, to make, alter or destroy any contract, to waive forfeitures, nor to receive any moneys due or to become due to said company, except on policies or renewal receipts signed by the President, Secretary

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or Manager of the Ordinary Branch and sent to him for collection."

These facts constituted, substantially, the plaintiff's case, and the defendant thereupon moved for a nonsuit, on the ground that the plaintiff had failed to make out a cause of action. The court denied the motion. The defendant swore the general agent and sub-agent as witnesses, and each positively denied that the conversation testified to by plaintiff ever occurred between the general agent and the insured.

At the close of the evidence the defendant again moved for a nonsuit and for a directed verdict, specifying, among others, the ground that upon the plaintiff's own evidence, and upon the uncontradicted evidence in the case, the general agent had no authority to make or modify the contract of insurance as testified by plaintiff.

The learned trial judge, in denying this motion, said: "I deny the motion and give you an exception. The one question I am going to submit to the jury is this: whether on January 6th, 1900, Mr. Tennant, at the time he delivered the policy to Mr. Russell, agreed that the time for payment of the premium should be extended, as is claimed by plaintiff, and that the policy could, in the meantime, remain in force. That is the only question I am going to submit to the jury. If they find in favor of the plaintiff upon that state of facts the verdict will be for plaintiff. If they find for defendant upon that proposition the verdict will be for the defendant." To this limitation the defendant excepted.

The trial judge, in one of his rulings, said: "I hold as matter of law that if Mr. Tennant did what plaintiff claims he did on the 6th of January, then there can be a recovery in this case." To this ruling the defendant excepted.

The defendant contended that if there was any evidence that Tennant had apparent authority to put the policy in force and waive its express conditions, and any evidence of estoppel, the questions were for the jury, but the court adhered to its view that it was a question of law upon the contract of insurance.

The important question presented in this case, therefore, is, can an insurance company so draw the various papers constituting its contract of insurance as to prevent general and local agents from exercising powers to the detriment of the company, when the substantial provisions of that contract are brought home to the insured prior to the alleged delivery of the policy.

This case may be regarded as a test one on the point, as it is apparent that the contract of insurance now before the court is as strong in favor of the company as language can make it.

In considering the law of this case, we are met at the outset by the contention of the respondent that the case of *Stewart v. Union Mutual Life Ins. Co.* (155 N. Y. 257) is controlling. In that case it was held that the right of insurance companies to restrict their liabilities for acts of their agents, by inserting clauses in the application and policy restricting the powers of agents, must be recognized, unless by so doing their contracts would become tainted with fraud, and in such case it will be presumed that the waiver was intended rather than fraud. In that case it was distinctly held that to have decided it in favor of the company would have worked a fraud upon the insured under the undisputed facts.

The defendant in the case cited was a Maine corporation.

It is true that the application and policy were quite similar to the case at bar. The application provided that "it will constitute no contract of insurance until a policy shall have first been issued and delivered by the company and the first premium thereon paid during the life of the party proposed for insurance in the same condition of health as described in the application."

The policy provided that "All premiums are due at the office of the company in the City of Portland, Maine, at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt thereof, signed by the President, Secretary or Assist-

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ant Secretary. Any payments made to any person except in exchange for such receipt will not be recognized by the company, or be deemed by either party as a valid payment. No agent, nor any other person, except the President, or Secretary, in writing has power to alter or change in any way the terms of this contract, or to waive forfeiture."

One Crane was the manager of the defendant's business in the state of New York. The precise powers of the manager do not appear, and we are, therefore, not advised whether he was clothed with more ample authority than the general agent in the case at bar. The policy was issued on the 19th day of April, 1890, on the life of the plaintiff's husband. The manager delivered the policy to the insured, taking a note for \$123.10, being the amount of the first year's premium, which note became due and payable on May 31st, 1890. On August 9th, 1890, a check for the amount of this note, which had been given by the insured to the manager in response to a letter from the cashier of the company, dated four or five days before the note fell due, calling the insured's attention to the due date, was deposited for collection, but returned by the bank marked, "not good." The insured was notified of the non-payment of this check August 9th; on August 12th the insured notified the manager he was ill, but would arrange for the payment of the check the last of that week. The insured died two days later.

We thus have the manager for the state of New York taking a note for the first year's premium, which was not paid at maturity, and accepting a check for the amount of the note, which was not paid on presentation two or three months after it was given.

It is thus rendered clear by inevitable inference that the home office in Maine must have been advised of this departure from the strict rule in regard to the payment of premium at the time the policy was issued and had ratified the action of its manager. It cannot be fairly assumed that a policy taking effect the latter part of April had not been reported to the home office by the following August.

This view was evidently entertained by the court, as appears in Judge HAIGHT's opinion, at the bottom of page 266, as follows: "There is still another theory upon which, we think, the plaintiff established a cause of action, at least sufficient to make it a question of fact for the jury. It is apparent that Crane represented to Stewart that he had an insurance and that Stewart supposed himself to be insured from the letters, expressions and acts to which we have referred. It is also apparent that the contract was that Stewart was to have credit. This may be clearly inferred from Crane's first letter. The rule is, that the knowledge of the agent is the knowledge of the principal, and it will be presumed that the company knew the terms of the contract entered into by its agent, and either waived the provisions of the policy for immediate payment of the premium, or held itself estopped from setting it up, for to hold otherwise would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument."

In the case at bar we have no such situation. The policy was delivered on the 6th day of January, and the insured was accidentally killed four days thereafter, so that there can be no presumption of ratification of the act of the general agent in delivering the policy without collecting the premium as required by the rules of the company. It follows that the case cited is distinguishable from the one at bar and offers no obstacle to our disposing of the latter on its peculiar facts.

In the case before us we have a contract that distinguishes it from a large number of cases which hold that the provision of the policy to the effect that only certain officers of the company can waive payment of premiums when due and that agents cannot do so, does not apply to the initial premium. This distinguishing feature is found in the fact that the application, which is made a part of the policy, contains the express condition that the policy shall not take effect until the same shall have been issued and delivered by the company and the first premium paid thereon in full.

In this connection it is to be observed that not only is the

application made a part of the policy by its terms, but the policy opens with this provision: "In consideration of the application for this policy, which is hereby made part of this contract, and of the quarterly annual premium of seven and 02-100 dollars, which it is agreed shall be paid to the company in exchange for its receipt on the delivery of this policy," etc.

The above quotation from the policy gives added significance to the manner in which the receipt was treated at the interview between the agents and the insured, to which reference has already been made. The policy states that it is to be given in exchange for the receipt, and it rests upon the undisputed evidence that the receipt was left in the custody of the sub-agent, not to be surrendered until the first premium was paid.

In many of the cases cited, where insurance companies were held liable, the agent having waived the payment of the first premium contrary to the provisions of the policy and without authority from the company, the decision was based upon the fact that the policy had never been delivered to the insured, and, consequently, he could not be charged with notice of its contents at the time of the agent's waiver of payment.

It was argued that to hold otherwise would practically permit the company, through its agent, to work a fraud upon the insured by leading him to believe that he had secured insurance when such was not the fact.

We have been cited to a multitude of cases by the respondent which it is quite impossible to review in detail within the limits of an ordinary opinion. Many of these are within the class to which reference has already been made, in regard to waiving the payment of the initial premium, and others deal with waiver in various forms, such as resting on the general course of business with the insured; knowledge of the agent before issuing the policy that property was subject to mortgage or other lien; that the title was in a third person; that there was other and undisclosed insurance, or various

conditions which would render the policy void, by its terms, if the company were not chargeable with the knowledge of its agent, by reason of information imparted to him by the insured during the preliminary negotiations.

In the case at bar there is no evidence of a course of business between the company and the insured, nor was it shown that the general agent had power to waive payment of the first premium. On the contrary, the plaintiff put in evidence the contract between the company and its general agent, which showed, affirmatively, that he possessed no such power.

We thus come to the important and controlling question in this case, whether the insured is to be charged with notice of the contents of the written application, which he executed, making the same a part of the contract of insurance.

The legal presumption is, in the absence of fraud, that the insured read or had read to him the application before signing it. This being so, he was advised that the policy could not issue or take effect until the first premium was paid thereon in full.

The legal effect is that the insured covenanted with the company directly, and not through its agent, that the policy was not to be binding upon the company until the first premium was paid in full.

Is this contract to be enforced as clearly written, or is it to be ignored for the reason that men enter into contracts without reading them and assume that a vague and unproven custom exists permitting a local agent to give life and validity to the policy without reference to the terms of the contract of insurance?

The question may be put in another form. Can an insurance company enter into a contract with a person applying for insurance, which can so fix the precise conditions under which the policy shall issue, that the agent, in the absence of express authority, cannot abrogate it?

It would seem that the mere statement of the foregoing questions would compel an answer in favor of the company without argument.

An insurance company is entitled to have its contract enforced by the courts as written, unless, as has been stated in many cases, to strictly construe it as against the insured would work a fraud upon him. As already pointed out, this might be the case in reference to the payment of the initial premium, where the only provisions in regard to the same are contained in the policy.

It cannot be said in this case, in the teeth of the express covenant of the insured contained in his application and carried into the policy with due reference to the same, that he would be subjected to a fraud if the waiver of the agent, made without authority, is held not to abrogate the contract between him and the company, of which he is chargeable with full notice.

We are of opinion that it was error for the learned trial judge to instruct the jury that if they found that at the interview between the agents and the insured the general agent delivered the policy to the insured and agreed with him that the time of the payment of the first premium should be extended, and that in the meantime the policy should be in force, that their verdict should be for the plaintiff.

The order and judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

HAIGHT, J. (dissenting). This action was brought to recover the amount of an insurance policy issued upon the life of Robert J. Russell, and payable to the plaintiff, his widow.

Charles H. Tennant was the general agent of the defendant, in charge of its office in Syracuse, and James F. O'Donnell was the sub-agent and a solicitor of insurance under him. Russell had made application for insurance through O'Donnell, and the policy had been issued by the company and sent to its general agent, Tennant. On the 6th day of January, 1900, Tennant and O'Donnell called upon Russell at his residence with the policy of insurance, and asked Russell if he wanted to pay the premium. He was not ready to pay at that time, and Tennant then said to him that he could have thirty days

in which to make the payment. He thereupon handed Russell the policy and gave him a receipt for the first payment, saying to him that the policy was in force from that time on. He then suggested that Russell better let O'Donnell hold the receipt until he paid the premium. Thereupon Russell handed the receipt to O'Donnell and then they went away. On the 10th day of January thereafter Russell was killed by the explosion of an engine in the Rapid Transit power house. Both O'Donnell and Tennant deny the statement of the plaintiff, to the effect that Tennant stated to Russell at the time he delivered the policy to him that it should be in force from that date on, thus raising a question of fact between the parties which was submitted to the jury, who found a verdict in favor of the plaintiff, thus settling that question of fact in accordance with the testimony of the plaintiff.

It is now contended that there can be no recovery upon this policy, for the reason that the application of insurance contained a clause to the effect that the policy shall not take effect until the same shall be issued and delivered by the company, and the first premium paid thereon in full. Upon the back of the policy there was printed the following: "No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any representation or information. These powers can be exercised only by the president, one of the vice-presidents or the secretary, and will not be delegated."

I had supposed that a general agent of an insurance company could waive a condition of the policy requiring prepayment of premium, in order to make the policy binding, and that this proposition was settled so firmly by judicial authority as to be beyond question. In *Sheldon v. Atlantic Fire and Marine Insurance Company* (26 N. Y. 460) it was held that a general agent of the insurer may waive a condition in the policy that no insurance should be considered as binding until actual payment of the premium. EMOTT, J., in delivering the

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opinion of the court, says with reference thereto: "There can be no dispute that Lewis could waive the actual prepayment of the premium. He was a general agent of this company, and whatever may have been his secret instructions the insurer had a right to rely upon his act. His principals were bound as well by a waiver on his part of the condition of prepayment of the premium as by his contracts of insurance." In *Wood v. Poughkeepsie Mutual Insurance Company* (32 N. Y. 619) PORTER, J., says: "Boggs was a general agent of the company. If he had waived the condition of prepayment the insurers would have been bound by his act, though it was in violation of their private instructions. The law would have implied such waiver if the policy had been delivered by the agent without requiring payment of the premium, and had been accepted by the plaintiff as a complete and executed contract. The company would have been held to its engagement, and the assured would have been liable for the premium, notwithstanding the acknowledgment of payment on the face of the paper." In *Boehen v. Williamsburgh City Insurance Company* (35 N. Y. 131) it was held that "Although, by the printed terms of the policy, it is stated that no policy will be considered binding until the premium is paid, yet the agent may waive such condition and give short credit. The delivery of a policy without requiring payment raises a presumption that a short credit is intended." (See, also, *McNeilly v. Continental Life Insurance Co.*, 66 N. Y. 23; *Marcus v. St. Louis Mutual Life Ins. Co.*, 68 N. Y. 625; *Palmer v. Phœnix Mutual Life Ins. Co.*, 84 N. Y. 63-70; *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415; May on Ins. [4th ed.] vol. 2, sec. 360b; 19 Am. & Eng. Ency. of Law [2d ed.] p. 55.)

But it is now claimed that a way has been discovered by which the settled law upon this subject can be evaded and annulled, and that is by printing upon the back of the policy issued a clause which seemingly deprives their agents of any power to give any information, make any representation, or to extend the time for the payment of the premium for a

single day. It is not pretended that this condition printed upon the back of the policy was ever called to the attention of Russell, or that he knew of its existence in his lifetime. It did not appear upon his application, and nothing was said with reference to it at the time of the interview in which the policy was delivered to him by the general agent of the company. He had no opportunity to read over and post himself with reference to the printed conditions upon the back of the policy until the agents had taken their departure. He does not, however, appear to have read it then, for immediately after the agents had left he handed it over to his wife, the plaintiff in this action, who since that time appears to have had the custody thereof.

It has been intimated that there was some merit in the defense to this action; that the jurors should have believed the agents instead of the plaintiff. But this question has, as I have already stated, been settled by the jury, and, I have no doubt, upon ample evidence to sustain the verdict. Indeed, the testimony of the agents is inconsistent with their conceded acts. They admit that the general agent, at the time and place stated by the plaintiff, delivered the policy to Russell and left it with him, and that he gave him time within which to make the payment. If the policy was not to be in force in the meantime, why was it delivered? Had it been held by the general agent until the money was paid, no one could have been deceived with reference to its force and effect. The very fact of its delivery, under the authorities to which we have referred, carries the presumption that it was in effect, and that any provision in the policy to the contrary was deemed waived. There is but one answer to the action of the agents, and that is that which the law implies. By the delivery of the policy to Russell and the inducing of him to accept it, he thereby became bound to pay the premium from that day, together with the interest accruing thereon, and the same could be enforced in a court of law. Whereas, by holding the policy for one month without delivering it to the insured, would prevent its earning any premium during that month

which lawfully could be collected, and the company would thus be deprived of one-third of its first quarterly premium.

What, then, is the position of this defendant as disclosed by the record? It maintains an office in the city of Syracuse, presided over by a general agent of the company, who has the supervision of numerous sub-agents, but these agents cannot give any information, make any representation or promise on behalf of the company. The only power, apparently, given to the general agent is to deliver policies and collect premiums due thereon, but he has no power to extend the time for the payment or to make delivery of policies until the premiums are *actually paid in cash*. And yet this agent, having the power to deliver policies, delivered this policy without the payment of the premium, in violation of his instructions, arranging with the insured to give him thirty days within which to pay the premium, and to induce him to accept the policy representing to him that it was then in force. At the same time this agent knew that the policy contained the provisions alluded to, and that it would not be in force or binding upon the company, although Russell by his acceptance had become bound to pay the premium.

To sustain the company's position in this transaction is, to my mind, the permitting of it to practice a fraud, through its general agent, upon the insured. The general agent was acting within the scope of his employment in delivering the policy. Russell, in the absence of knowledge as to the instructions given the agent in the manual, and of the condition to which we have referred, had the right to rely and act upon the statements of the agents, made at the time of the delivery of the policy; and he having accepted the same, the company became bound by the contract. To hold otherwise would permit the company to deceive its customers by the false and fraudulent representations of its general agent, and at the same time avoid responsibility therefor. Parties to contracts, including insurance companies, cannot be permitted to avail themselves of their own fraud, in order to escape liability for

failure to perform their contracts. (Broom's Legal Maxims, 320.)

The case of *Stewart v. Union Mutual Life Insurance Company* (155 N. Y. 257), while distinguishable from the case under consideration as to the facts, is not, in my judgment, distinguishable as to the questions of law involved.

Under the view taken by me of this case, the exceptions appearing upon the record present no error calling for a reversal.

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN and MARTIN, JJ., concur with BARTLETT, J.; HAIGHT, J., reads dissenting opinion; VANN, J., not voting.

Order and judgment reversed, etc

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES SMITH, Appellant, v. II. LUTHER WEEKS, Town Clerk of the Town of Hempstead, Respondent.

NASSAU (COUNTY OF) — INVALIDITY OF RESOLUTION OF BOARD OF SUPERVISORS OF NASSAU COUNTY, PASSED APRIL 9, 1901, PROVIDING THAT BIENNIAL TOWN MEETINGS IN SAID COUNTY IN THE YEAR 1903 AND THEREAFTER SHOULD BE HELD ON THE FIRST TUESDAY AFTER THE FIRST MONDAY IN NOVEMBER. A resolution, passed by the board of supervisors of Nassau county on April 9, 1901, seven days after the election of such board for the term of two years from the date of such election, providing that the biennial town meetings in said county in the year 1903 and thereafter should be held on the first Tuesday after the first Monday in November, is not supported by the statute (L. 1901, ch. 391), by which such resolution was claimed to be authorized, since the statute did not become a law until April 17, 1901, eight days after the passage of the resolution, and was not intended to be retroactive in its effect, its provisions being in terms limited to town officers "hereafter elected," and to cases where the resolution changing the town meeting is "thereafter" adopted; neither is such resolution authorized by chapter 374 of the Laws of 1900, nor by chapter 191 of the Laws of 1901, which are the only statutes, prior to chapter 391 of the Laws of 1901, authorizing boards of supervisors to provide for the holding of town meetings at the time of general elections in the fall, since the resolution in question attempted to extend the term

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of the town officers then in office beyond the period of two years, the term fixed for such officers by chapter 191 of the Laws of 1901, and hence the resolution was not only without statutory authority in its support, but was in violation of it, and, therefore, in violation of section 26 of article III of the Constitution, which provides that members of boards of supervisors shall be "elected in such manner and for such period as is or may be provided by law."

People ex rel. Smith v. Weeks, 87 App. Div. 610, affirmed.

(Argued October 5, 1903; decided October 8, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered September 28, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Fred. Ingraham and *Henry A. Monfort* for appellant. It is competent for the legislature, under the Constitution, to lengthen the terms of office of town officers in advance of their election. (Const. of N. Y. art. 10, § 2; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374; *People ex rel. v. Foley*, 148 N. Y. 677.) Although, at the time of the passage of the resolution assailed, the legislature had not expressly declared that, in case of such a change in town meeting day, the present incumbents of the town offices should hold over and continue in office until their successors should be elected and had qualified, yet such an intent on its part is clearly to be inferred from section 10 of the Town Law as amended in 1898, and as it then stood. (*Riggs v. Palmer*, 115 N. Y. 506; *People ex rel. v. Crennan*, 141 N. Y. 239; *People v. U. Ins. Co.*, 15 Johns. 358.)

Edgar Jackson for respondent. The assumption that the resolution of the board of supervisors of April 9, 1901, was effective, and the supervisors and town officers hold over after the expiration of their terms until successors can be elected, is not tenable. (Const. of N. Y. art. 3, §§ 18, 26; *People ex rel. v. Bull*, 46 N. Y. 57.) The assumption that there was no exten-

sion of term caused by the supervisors' resolution of April 9, 1901, but that the electors cast their ballots with the contingency in view that the supervisors might make their own terms and those of all officers of the towns expire on the 1st day of January, 1904, instead of in April, 1903, *i. e.*, that the statute impliedly extended or shortened the terms of supervisors and town officers, making such extension or shortening contingent upon a change in time of holding town meeting, is not tenable. (L. 1901, ch. 191, § 13; Const. of N. Y. art. 10, § 3; *People ex rel. v. Palmer*, 154 N. Y. 133.) The appellant cannot seriously contend that two biennial town meetings can be held in the same year. The statute provides that the electors shall biennially and not twice in one year assemble and hold meetings. (L. 1900, ch. 374, § 10; L. 1901, ch. 191, § 13.) The term of town officers already duly elected cannot be extended by the legislature or board of supervisors. (*People ex rel. v. Foley*, 148 N. Y. 677; *People ex rel. v. Randall*, 151 N. Y. 497.) The legislature cannot authorize any county officer to appoint or extend the term of town officers. (*Matter of Brenner*, 170 N. Y. 50; *Rathbone v. Wirth*, 6 App. Div. 277; 170 N. Y. 459; *People ex rel. v. Albertson*, 55 N. Y. 50; *People ex rel. v. McKinney*, 52 N. Y. 374.)

John Vincent for William H. Jones, intervening. The supervisors elected in 1901 were elected for two years only. That was the duration of their term as fixed by statute when that election was held. They were, therefore, entitled to hold office for the period fixed by the legislature under constitutional authority, or until April, 1903, and no longer. Their terms could not be abridged or extended, either by their own act or by an act of the state legislature, without violating the State Constitution. (L. 1901, ch. 391, § 2; *People ex rel. v. Palmer*, 154 N. Y. 133; *Ashton v. City of Rochester*, 133 N. Y. 187; *Nichols v. McLean*, 101 N. Y. 526; *Gardner v. Gardner*, 87 N. Y. 14; *Sage v. Harpending*, 49 Barb. 166; *Tyler v. Willis*, 35 Barb. 213; 13 Abb. Pr. 369; *Stevens v. Stevens*, 69 Hun, 332; *Marcellus v. Countryman*, 65 Barb.

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201; *Coburn v. Woodworth*, 31 Barb. 381; *Matter of Ransier*, 26 Misc. Rep. 582.)

Halstead Scudder for Girdell V. Brower, intervening. The town meeting held in April was not a nullity either in whole or in part. (*Gray v. Scott*, 31 Misc. Rep. 131; 57 App. Div. 630.) The term of an elective officer cannot be extended during the incumbency of the occupant. (*People ex rel. v. Scott*, 31 Misc. Rep. 131; 57 App. Div. 630; *People ex rel. v. Foley*, 148 N. Y. 677; *People ex rel. v. Randall*, 151 N. Y. 497; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Schiellein*, 95 N. Y. 127; *People ex rel. v. Blair*, 21 App. Div. 217, 218; 154 N. Y. 734; *People ex rel. v. Palmer*, 154 N. Y. 133.) The resolution adopted by the board of supervisors of Nassau county in April, 1901, was invalid in so far as it changed the time of town meeting from April to November in 1903. (*Matter of Seaman*, 82 App. Div. 643.) The April, 1901, resolution must stand on the authority of the statutes in force at the time it was enacted and in default of authority being found for its enactment in those statutes it must fall. (L. 1900, ch. 374; L. 1901, ch. 191; *People ex rel. v. Palmer*, 154 N. Y. 133.)

George Wallace for James M. Seaman, intervening. The term of elective officers cannot be extended by the legislature or by the supervisors. (*People ex rel. v. Scott*, 31 Misc. Rep. 131; 57 App. Div. 630; *People ex rel. v. Foley*, 148 N. Y. 677; *People ex rel. v. Randall*, 151 N. Y. 497; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Schiellein*, 95 N. Y. 127; *People ex rel. v. Blair*, 21 App. Div. 217; 154 N. Y. 734; *People ex rel. v. Palmer*, 154 N. Y. 133.)

PARKER, Ch. J. The county of Nassau came into existence January 1, 1899, by ch. 588, Laws 1898, section 5 of which provided that the first meeting of the board of supervisors should be held January 3, 1899.

During such session the board passed an act pursuant to

statute (Ch. 481, Laws 1897) fixing the first Tuesday in April as the time when biennial town meetings should be held. Such an election was held April 2, 1901, and seven days later the board of supervisors, the members of which had been elected at that meeting, passed a resolution providing that the biennial town meetings in the year 1903 and thereafter should be held on the first Tuesday after the first Monday in November.

The authority for this resolution was deemed by the board to be furnished by an amendment (Ch. 191, Laws 1901) to section 10 of the Town Law, which for the first time permitted boards of supervisors to change the time of holding biennial town meetings to the fall. But for the passage of this resolution the biennial election would have been in April, 1903, in pursuance of the provision of the resolution first adopted. The operation of the statute upon the resolution first adopted fixed the term of office for which the supervisors were elected in 1901 at two years. One of the results accomplished by the resolution of April 9, 1901, if it was a valid resolution, was to extend the term of office of those supervisors several months.

In March, 1903, and upon the last day fixed by the statute for filing certificates for independent nominations for town officers at a spring election, certificates of nomination for the offices of supervisor, town clerk and all other town offices were duly presented to the town clerks of the several towns of the county of Nassau. The clerks refusing to receive such certificates, Mr. Justice GAYNOR made an order directing said town clerks to receive such certificates, and to call an election in the several towns, which was done, an election held and the successful candidates inducted into office. That order was affirmed by the Appellate Division of the second department, and an appeal taken to this court; but it was not heard, because the election having passed, and the candidates having taken possession of their offices, the question had become purely an academic one.

August 3, 1903, relator demanded of the clerk of the town of Hempstead that he make and transmit to the county clerk a

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notice stating each town officer to be voted for at a biennial town meeting to be held on the first Tuesday after the first Monday in November, 1903, pursuant to the resolution of the board of supervisors (*supra*). The town clerk refused, and relator applied for an order compelling him to make and file such a list. The application was denied. After affirmance by the second Appellate Division an appeal was taken to this court.

The leading question presented is whether the resolution of April 9, 1901, was in all things valid, for if it was the order to compel an election in April, 1903, should not have been granted, and the proper time for the election will be on the first Tuesday after the first Monday in November, 1903.

The necessity for a prompt decision in order that the officials charged with the responsibility of the local election machinery may be advised of their duty in the premises prevents us from doing much more than presenting briefly the conclusion at which we have arrived, which is, that there was no statutory authority for the passage of a resolution like the one in question, extending the term of office of the officials affected.

The resolution of April 9, 1901, is not supported by ch. 391, Laws 1901, because (1) such act did not become a law until April 17, 1901, eight days after the passage of the resolution; and (2) an examination shows the statute was not intended to be retroactive in its effect, for its provisions are in terms limited to town officers "hereafter elected," and to cases where the resolution changing the town meeting is "thereafter" adopted.

The April 9th resolution, therefore, must find its support, if at all, in prior statutes. The first act authorizing boards of supervisors to provide for the holding of town meetings at the time of general elections in the fall is chapter 374, Laws 1900. The next and only other statute on the subject, prior to the resolution in question, is chapter 191, Laws 1901. It was possible under these acts to have provided for a change of town elections from spring to fall without offending against

article III, section 26, of the Constitution, which provides that members of boards of supervisors shall be "elected in such manner and *for such period* as is or may be provided by law." This could have been accomplished by a resolution in the form suggested by respondent's counsel, to wit:

"The biennial town meetings in the several towns of the county of Nassau in the year 1903 shall be held in April, pursuant to the resolution passed by this board January 3, 1899. At said town meeting there shall be elected a supervisor, town clerk, et al. (comprising list of town officers) whose term of office shall begin at the expiration of the term of their predecessors, and shall end at midnight on December 31, 1905. A town meeting to elect the successors to the said town officers shall be held on the first Tuesday after the first Monday in November, 1905, and the town officers elected thereat shall take office on January 1, 1906; thereafter town meetings shall be held on the first Tuesday after the first Monday in November."

A resolution in that form would have been fully authorized by the statutes referred to, and would not have offended against any provision of the Constitution.

The resolution adopted, however, attempted to extend the time of the town officers then in office beyond the period of two years authorized by chapter 191, Laws 1901, for which term they had been elected, and hence was not only without statutory authority in its support, but was in violation of it. The resolution, therefore, was without authority and void, and the decision below should be affirmed, without costs.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
J. LUTHER PIERSON, Respondent.

1. MISDEMEANOR — UNLAWFUL OMISSION TO PROVIDE MEDICAL ATTENDANCE FOR A MINOR CHILD — WHEN INDICTMENT THEREFOR SUFFICIENT — WHEN OMISSION TO FURNISH MEDICAL ATTENDANCE IS UNLAWFUL. An indictment under section 288 of the Penal Code, providing that "A person who, 1, willfully omits without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor * * * or, 4, neglects, refuses or omits to comply with any provisions of this section, * * * is guilty of a misdemeanor," which charges that the defendant willfully, maliciously and unlawfully omitted, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his minor child, said minor being ill and suffering from catarrhal pneumonia, and that he willfully, maliciously and unlawfully neglected and refused to allow said minor to be attended and provided for by a regularly licensed and practicing physician, is not bad because it fails to allege that the case was one in which a regularly licensed and practicing physician should have been called, and, therefore, fails to charge a criminal offense, since that is necessarily implied from the language used; if the medical attendance was not necessary it was not a duty required of the defendant to furnish it; if it was necessary then it was his duty to furnish it and his failure to do so is an unlawful omission to perform a duty imposed, and constitutes a misdemeanor.

2. TEST OF NECESSITY FOR MEDICAL ATTENDANCE — REASONABLE DISCRETION. The necessary medical attendance required for the preservation of the health of the child does not contemplate the necessity of calling a physician for every trifling complaint with which the child may be afflicted, which in most instances may be overcome by the ordinary household nursing by members of the family; a reasonable amount of discretion is vested in persons upon whom the duty is imposed, and the standard is, at what time would an ordinarily prudent person, solicitous for the welfare of the child and anxious to promote its recovery, deem it necessary to call in the services of a physician.

3. DUTY TO FURNISH MEDICAL ATTENDANCE TO MINOR CHILD IMPOSED BY STATUTE ON GUARDIANS, PARENTS AND THOSE IN LOCO PARENTIS. The phrase "a duty by law imposed" has reference to persons designated in the statutes and in the common law as parents, guardians or those who by adoption or otherwise have assumed the relation *in loco parentis*, and the character of the duties is specified in the section, and, therefore, assuming that such persons were not bound at common law to furnish medical attendance for minors, that duty is expressly provided for and is made obligatory upon them by the statute.

4. MEANING OF "MEDICAL ATTENDANCE." The term "medical attendance" means attendance by a person who under the statute (L. 1880, ch. 513) is a regularly licensed physician, and does not include that by a layman who, because of his religious belief that prayer for Divine aid was the proper remedy for sickness, neglects to furnish proper medical attendance to a minor child who was dangerously ill.

5. CONSTITUTIONAL GUARANTY OF FREEDOM OF WORSHIP NOT VIOLATED BY STATUTORY REQUIREMENT. The constitutional guaranty of the full and free enjoyment of religious profession and worship (Const. art. 1, § 3) is not violated by the statute, since practices inconsistent with the peace and safety of the state are not justifiable, and the peace and safety of the state involves the protection of the lives and health of its children as well as obedience to its laws—the omission, therefore to afford this protection is a public wrong and properly punishable as such.

People v. Pierson, 80 App. Div. 415, reversed.

(Argued June 15, 1903; decided October 13, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 25, 1903, which reversed a judgment of the Westchester County Court entered upon a verdict convicting the defendant of a misdemeanor and granting a new trial.

The facts, so far as material, are stated in the opinion.

J. Addison Young for appellant. The indictment charges a crime and the appellate court erred in reversing the judgment of conviction on this ground. (Penal Code, § 288.) The defendant was under a duty imposed by statute to see to it that he did not cause or permit the life of his child to be endangered or its health to be impaired. (Penal Code, § 289; *Cowley v. People*, 83 N. Y. 464; *People v. McDonald*, 49 Hun, 67; *Regina v. Downes*, 13 Cox Cr. Cas. 111; *Queen v. Senior*, L. R. [1 Q. B. Div.] 283.)

Robert E. Farley for respondent. The statute under which the defendant was tried and convicted does not in terms or effect declare that it is the duty of any one to furnish medical attendance to a minor. (Penal Code, § 288.) The statute

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being penal in its nature must be strictly construed in favor of the accused. (*V. C. C. Co. v. Murtagh*, 50 N. Y. 314; *Sturgis v. Spofford*, 45 N. Y. 446, 453; *People v. Rosenberg*, 138 N. Y. 410, 415; *People v. Nelson*, 153 N. Y. 90, 94.) The defendant having been guilty of no offense at common law, his liability, if any, must be under the statute, and no statutory offense can be established by implication. There must be a clear and positive expression of the legislative intent to make a given act or omission criminal. (*People v. Phylfe*, 136 N. Y. 554.) There is no common-law duty to furnish medical attendance to a minor. (*Reg. v. Beers*, 32 Canada L. J. 416; *Reg. v. Coventry*, 2 N. T. Rep. 245; *Reg. v. Wagstaffe*, 10 Cox C. C. 530; 1 Whart. Crim. Law [10th ed.], 352.) Medicine and medical attendance are not necessities under the law. (*Corsi v. Maretzek*, 4 E. D. Smith, 1.) To compel a citizen to furnish medical attendance for his infant child would be an invasion of an inalienable right and a violation of the Constitution. (*Powell v. Penn.*, 127 U. S. 678; 1 Tiedemann on Police Powers, 4, 7-17; *Lawton v. Steele*, 119 N. Y. 226; *L. S., etc., R. R. Co. v. Smith*, 173 U. S. 689; *Allgeyer v. State of Louisiana*, 165 U. S. 578; *Colon v. Lisk*, 153 N. Y. 188; *People ex rel. v. Warden*, 157 N. Y. 129; *People ex rel. v. Warden*, 144 N. Y. 535; *Matter of Jacobs*, 98 N. Y. 98; *People v. Havnor*, 149 N. Y. 195; *People v. Turner*, 55 Ill. 280.) Unless the defendant had an evil intent he was not guilty of the crime charged. (*Stokes v. People*, 53 N. Y. 179.) The indictment failed to charge a criminal offense. (*Wood v. People*, 53 N. Y. 511; *People v. Dumar*, 106 N. Y. 502; *Tully v. People*, 67 N. Y. 15; *People v. Allen*, 5 Den. 76; *People v. Albron*, 140 N. Y. 130.)

HAIGHT, J. The indictment accused the defendant of the crime of violating section 238 of the Penal Code in that he "did wilfully, maliciously, and unlawfully omit without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said (J. Luther Pierson's) female minor child, under the age of two years, the said minor

being then and there ill and suffering from catarrhal pneumonia, and he, the said J. Luther Pierson, then and there wilfully, maliciously, and unlawfully neglecting and refusing to allow said minor to be attended and prescribed for by a regularly licensed and practicing physician and surgeon, contrary to the form of the statute in such case made and provided."

The facts disclosed upon the trial are without substantial dispute, and are in substance as follows: The defendant and his wife lived at Valhalla near White Plains, New York, with an infant girl sixteen and a half months old, whom they had adopted. In January, 1901, the child contracted whooping cough which continued to afflict her until about the 20th day of February, at which time catarrhal pneumonia developed, resulting in death on the 23rd of February, 1901. The defendant testified that for about forty-eight hours before the child died he observed that her symptoms were of a dangerous character, and yet he did not send for or call a physician to treat her, although he was able financially to do so. His reason for not calling a physician was that he believed in Divine healing which could be accomplished by prayer. He stated that he belonged to the Christian Catholic church of Chicago, that he did not believe in physicians, and his religious faith led him to believe that the child would get well by prayer. He believed in disease, but believed that religion was a cure of disease.

In submitting the case to the jury the trial court charged, in substance, that before the jurors could convict the defendant they must find that he knew that the child was ill, and deliberately and intentionally failed or refused to call a physician, or to give the child such medicines as the science of the age would say would be proper that a child in its condition should have; that if at the time he refused to call a physician he knew the child to be dangerously ill, his belief constitutes no defense whatever to the charge made. In other words, no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the law of the state. The jury rendered a verdict of guilty

of the crime as charged. The Appellate Division has reversed, but, as we have seen, has examined the facts and found no error therein, but rests its reversal upon what it considers to be errors of law. The majority of the court appears to have entertained the view that the indictment failed to charge a criminal offense, for the reason that it did not contain an allegation that the case was one in which a regularly licensed and practicing physician ought to have been called.

Section 258 of the Penal Code, so far as is material upon the question under consideration, provides as follows: "A person who, 1. Wilfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter, or medical attendance to a minor, * * * or, 4. Neglects, refuses or omits to comply with any provisions of this section, * * * is guilty of a misdemeanor."

It would seem that the legislative intent in adopting this provision of the Code is reasonably clear, although possibly more precise language could have been employed. It contemplates that there are persons upon whom the law casts a duty of caring for minors, but it does not specify the persons. They are, however, those upon whom the duty is "by law imposed." They are designated in the statutes and in the common law as the parents, guardians, or those who by adoption or otherwise have assumed the relation *in loco parentis*. The duty of such a person is specified by the provisions of the section. It is "to furnish food, clothing, shelter, or medical attendance." Giving the statute a reasonable construction by applying the rule of necessity, it is apparent that it means the necessary food, clothing, shelter or medical attendance required for the preservation of the health and life of the child. We quite agree that the Code does not contemplate the necessity of calling a physician for every trifling complaint with which the child may be afflicted which in most instances may be overcome by the ordinary household nursing by members of the family; that a reasonable amount of discretion is vested in parents, charged with the duty of maintaining and bringing up infant children; and that the

standard is at what time would an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician. But is it necessary that all of this should be set forth in the indictment? The indictment has alleged that the defendant unlawfully omitted to perform a duty imposed upon him, to furnish medical attendance for the child. If the medical attendance was not necessary, it was not a duty required of the defendant to furnish it; but if it was necessary, then it was his duty to furnish it, and his failure to do so would be an unlawful omission to perform a duty imposed, as charged in the indictment. We, therefore, think that the criticism made upon the indictment cannot be sustained.

It is now contended that section 288 of the Penal Code does not in terms, or in effect, make it the duty of any one to furnish medical attendance to a minor child, and that under the common law it is not part of the duty of parents to provide medical attendance for their children. We have already considered, in part, the provisions of the section and have indicated our conclusion that the clause, "a duty by law imposed," as found in this section, had reference to the person upon whom the law imposed the duty of caring for minors, leaving it to the provisions of the section to particularize as to the character of those duties. In other words, that the section, properly construed, means that a person upon whom the law has imposed the duty to care for a minor, who willfully omits without lawful excuse to furnish such minor with necessary food, clothing, shelter or medical attendance, is guilty of a misdemeanor. Under this construction of the statute, the duty of parents to furnish medical attendance for their children is expressly provided for, and is made obligatory upon them, even if they were exempt from such duty under the common law. These views are in harmony with section 289 of the Penal Code, which provides that "A person who: 1. Wilfully causes or permits the life or limb of any child actually or apparently under the age of sixteen years to be endangered, or its health to be injured, or its morals to become depraved,

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* * * is guilty of a misdemeanor," and are also in accord with the view taken by this court in the case of *Cowley v. People* (83 N. Y. 464), in which the judgment of conviction was sustained, where the indictment charged the injury to the child's health by reason of a neglect to furnish and administer to it proper and sufficient medicine and furnish proper medical attendance, under the latter section of the Code.

We are thus brought to a consideration of what is meant by the term "medical attendance." Does it mean a regularly licensed physician, or may some other person render "medical attendance?" The foundation of medical science was laid by Hippocrates in Greece five hundred years before the Christian era. His discoveries, experiences and observations were further developed and taught in the schools of Alexandria and Salerno, and have come down to us through all the intervening centuries, yet medicine as a science made but little advance in northern Europe for many years thereafter; practically none until the dawn of the eighteenth century. After the adoption of Christianity by Rome and the conversion of the greater part of Europe, there commenced a growth of legends of miracles connected with the lives of great men who became benefactors of humanity. Some of these have been canonized by the church, and are to-day looked upon by a large portion of the Christian world as saints who had miraculous power. The great majority of miracles recorded had reference to the healing of the sick through Divine intervention, and so extensively was this belief rooted in the minds of the people that for a thousand years or more it was considered dishonorable to practice physic or surgery. At the Lateran Council of the church, held at the beginning of the thirteenth century, physicians were forbidden, under pain of expulsion from the church, to undertake medical treatment without calling in a priest; and as late as two hundred and fifty years thereafter Pope Pius V renewed the command of Pope Innocent by enforcing the penalties. The curing by miracles, or by interposition of Divine power, continued throughout Christian Europe during the entire period of the Middle Ages,

and was the mode of treating sickness recognized by the church. This power to heal was not confined to the Catholics alone, but was also in later years invoked by Protestants and by rulers. We are told that Henry VIII, Queen Elizabeth, the Stuarts, James I and Charles I, all possessed the power to cure epilepsy, scrofula and other diseases known as the king's evil; and there is incontrovertible evidence that Charles II, the most thorough debauchee who ever sat on the English throne, possessed this miraculous gift in a marked degree, and that for the purpose of effecting cures he touched nearly a hundred thousand persons.

With the commencement of the eighteenth century a number of important discoveries were made in medicine and surgery which effected a great change in public sentiment, and these have been followed by numerous discoveries of specifics in drugs and compounds. These discoveries have resulted in the establishment of schools for experiments and colleges throughout the civilized world for the special education of those who have chosen the practice of medicine for their profession. These schools and colleges have gone a long way in establishing medicine as a science, and such it has come to be recognized in the law of our land. By the middle of the eighteenth century the custom of calling upon practitioners of medicine in case of serious illness had become quite general in England, France and Germany, and, indeed, to a considerable extent throughout Europe and in this country. From that time on the practice among the people of engaging physicians has continued to increase until it has come to be regarded as a duty, devolving upon persons having the care of others, to call upon medical assistance in case of serious illness. Schouler, in his work on Domestic Relations, at page 318, speaking upon the subject of parental duty in the maintenance of children, says: "It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents; and this precept have all nations enforced." And again, at page 548, speaking upon the subject of what constitutes necessary maintenance, he

says: "Food, lodging, clothes, *medical attendance*, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessities." In England the first statute upon the subject to which our attention has been called, was that of 31 and 32 Vict., chapter 122, section 37, which made it the duty of persons having the care of infants to provide them with "medical aid." This statute was amended in 1894 by 57 and 58 Vict., chapter 41, so as to read substantially the same as section 289 of our Penal Code, to which we have referred. Our own statute upon the subject was adopted as part of the Penal Code, chapter 676 of the Laws of 1881, containing the section under which the defendant is indicted.

Formerly, no license or certificate was required of a person who undertook the practice of medicine. A certificate or diploma of an incorporated medical college was looked upon by the public as furnishing the necessary qualification for a person to engage in the practice of such profession. The result was that many persons engaged in the practice of medicine who had acquired no scientific knowledge with reference to the character of diseases or of the ingredients of drugs that they administered, some of whom imposed upon the public by purchasing diplomas from fraudulent concerns and advertising them as real. This resulted in the adoption of several statutes upon the subject. The first statute to which we call attention is chapter 513 of the Laws of 1880, in which every person, before commencing to practice physic and surgery, is required to procure himself to be registered in the office of the clerk of the county where he intends to practice, giving the authority under which he claims the right to engage in the profession, either by diploma or license, and making a violation of the provisions of the act a misdemeanor. Although this statute was an amendment of chapter 746 of the Laws of 1872, it is the first statute that we have found which prohibits the practice of medicine by any other than a person possessing a diploma from a medical college conferring upon him the degree of doctor of medicine, or a certificate from the constituted authorities giving him the

right to practice. This was followed by the Laws of 1887, chapter 647, entitled, "An act to regulate the licensing and registration of physicians and to codify the medical laws of the state of New York," which has been further amended and carried into the Public Health Law of 1893, sections 140-153 inclusive, in which there is an absolute prohibition to practice physics unless the person be a regularly licensed physician in accordance with the provisions of the act.

It will be observed that the provision of the Penal Code under consideration was first adopted in 1881 following the statute of 1880 prohibiting the practice of medicine by other than physicians duly qualified in accordance with the provisions of the act. This, we think, is significant. The legislature first limits the right to practice medicine to those who have been licensed and registered or have received a diploma from some incorporated college conferring upon them the degree of doctor of medicine, and then the following year it enacts the provision of the Penal Code under consideration, in which it requires the procurement of medical attendance under the circumstances to which we have called attention. We think, therefore, that the medical attendance required by the Code is the authorized medical attendance prescribed by the statute, and this view is strengthened from the fact that the third subdivision of this section of the Code requires nurses to report certain conditions of infants under two weeks of age "to a legally qualified practitioner of medicine of the city, town or place where such child is being cared for," thus particularly specifying the kind of practitioner recognized by the statute as a medical attendant.

The remaining question which we deem it necessary to consider is the claim that the provisions of the Code are violative of the provisions of the Constitution, article 1, section 3, which provides that "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious

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belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." The peace and safety of the state involves the protection of the lives and health of its children as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children when born into the world are utterly helpless, having neither the power to care for, protect or maintain themselves. They are exposed to all the ills to which flesh is heir, and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance and preservation, including medical attendance if necessary, and an omission to do this is a public wrong which the state, under its police powers, may prevent. The legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress. While it has no power to deprive persons of life, liberty or property without due process of law, it may, in case of the commission of acts which are public wrongs or which are destructive of private rights, specify that for which the punishment shall be death, imprisonment or the forfeiture of property. (*Barker v. People*, 3 Cow. 686-704; *Lawton v. Steele*, 119 N. Y. 226-236; *Thurlow v. Commonwealth of Mass.*, 5 How. [U. S.] 504-583.)

We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. There are others who believe that the

Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance, including the restoration and preservation of his health, and that he is left to work out his own salvation, under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; that science is but the agent of the Almighty through which he accomplishes results, and that both science and Divine power may be invoked together to restore diseased and suffering humanity. But, sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature. We have considered the legal proposition raised by the record, and have found no error on the part of the trial court that called for a reversal. The other questions in the case involve questions of fact which are not brought up for review, and consequently are not before us for consideration.

The order of the Appellate Division reversing the judgment of conviction should be reversed, and the judgment of conviction of the trial court affirmed.

CULLEN, J. I concur in the opinion of Judge HAIGHT. The State as *parens patriæ* is authorized to legislate for the protection of children. As to an adult (except possibly in the case of a contagious disease which would affect the health of others) I think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other considerations.

PARKER, Ch. J., BARTLETT, VANN, CULLEN and WERNER, JJ., concur; MARTIN, J., not voting.

Order reversed, etc.

In the Matter of the Petition of the BROOKLYN UNION ELEVATED RAILROAD COMPANY, Respondent, Relative to Acquiring Title to a Right of Way on Lexington Avenue and Other Streets in the Borough of Brooklyn in the City of New York; THEODORE B. CASE, Appellant.

COSTS — WHAT COSTS MAY BE RECOVERED BY LANDOWNER SUCCESSFULLY DEFENDING CONDEMNATION PROCEEDING INSTITUTED UNDER SECTION 3372 OF CODE OF CIVIL PROCEDURE. Where the compensation awarded to the owner of real property, by the commissioners in a condemnation proceeding instituted under section 3372 of the Code of Civil Procedure, exceeds the amount offered by the corporation seeking to condemn the property, with interest from the time the offer was made, the landowner is entitled to recover the same amount of costs that a defendant may recover under section 3251 of the Code of Civil Procedure when he has prevailed in an action in the Supreme Court after a trial; ten dollars costs for proceedings before notice of trial and fifteen dollars after notice of trial, with thirty dollars costs for a trial of an issue of fact and ten dollars for a trial occupying more than two days.

Matter of Brooklyn Union El. R. R. Co., 82 App. Div. 567, reversed.

(Argued October 6, 1903; decided October 13, 1903.)

APPEAL by permission from an order of the Appellate Division of the Supreme Court in the second judicial department entered April 17, 1903, which reversed an order of Special Term retaxing a bill of costs.

The facts, so far as material, and questions certified, are stated in the opinion.

Cyrus V. Washburn for appellant. The state legislature, in enacting title 1 of chapter 23 of the Code of Civil Procedure, intended and did grant a defendant, entitled to costs under section 3372, the same amount as costs as a defendant is entitled to under section 3251 of the Code, when he has prevailed in an action in the Supreme Court after a trial. (*M. R. R. Co. v. Taber*, 78 Hun, 434; *M. R. R. Co. v. McKee*, 1 App. Div. 488; *M. R. R. Co. v. Kent*, 80 Hun, 557; *H. Co. v. N. Y., L. E. & W. R. R. Co.*, 83 Hun, 407;

L. S. & M. S. R. Co. v. Brinkman, 65 Hun, 538; *Tompkins v. Hunter*, 149 N. Y. 117.) The defendant, under the facts in this case, is entitled to ten dollars costs as for proceedings before notice of trial and fifteen dollars after notice of trial. (Code Civ. Pro. § 3372.) The defendant, under the facts in this case, is entitled to thirty dollars costs as for a trial of an issue of fact, and ten dollars as for a trial occupying more than two days. (*Place v. B. W. & C. M. Co.*, 28 How. Pr. 184; *Meyer v. Adams*, 63 App. Div. 540; *William v. Village*, 72 App. Div. 505; *Matter of S. B. R. Co.*, 143 N. Y. 253; *Matter of B. E. R. R. Co.*, 80 Hun, 356.)

Alexander S. Lyman and *George D. Yeomans* for respondent. The first question certified to this court it should either decline to answer as stating an abstract proposition or should answer in the negative. (*Hirsch v. Shea*, 156 N. Y. 169; *Matter of Davies*, 168 N. Y. 189; *Steinway v. von Bernuth*, 167 N. Y. 498; *Matter of Robinson*, 160 N. Y. 448; *Schenck v. Barnes*, 156 N. Y. 316; *Coatsworth v. L. V. R. R. Co.*, 156 N. Y. 451; *Matter of Coatsworth*, 160 N. Y. 114.) The defendant is not entitled, under the facts in this case, to costs before and after notice of a trial or for a trial fee or for a trial occupying more than two days. (*M. R. Co. v. Kent*, 145 N. Y. 595; *Matter of N. Y., L. & W. R. Co.*, 26 Hun, 592; *Matter of L. S. & M. S. R. Co.*, 65 Hun, 538; *M. R. Co. v. Taber*, 78 Hun, 434; *M. R. Co. v. McKee*, 1 App. Div. 488; *City of Johnstown v. Frederick*, 35 App. Div. 44; *St. Johnsville v. Cronk*, 55 App. Div. 633; *Peck v. S. R. Co.*, 170 N. Y. 298; *People v. Charbineau*, 115 N. Y. 436.)

BARTLETT, J. This appeal is certified by the Appellate Division and three questions are submitted for the consideration of this court.

This is a proceeding under the Condemnation Law of the Code of Civil Procedure brought by the plaintiff railroad company to acquire title to the easements or property rights appurtenant to the premises of the defendant owner.

An offer to the defendant was made by the plaintiff company as permitted by the Condemnation Law. No answer was interposed, commissioners were appointed, and the proceedings were conducted thereafter under section 3372 of the Code of Civil Procedure. The commissioners awarded nearly seven times the amount as compensation for the easements or property rights taken as that named in the offer. The court on confirming the report of the commissioners granted the defendant costs to be taxed in pursuance of section 3372.

The defendant presented to the clerk for taxation a bill as follows: Before notice of trial, \$10.00; after notice of trial, \$15.00; trial fee, \$30.00; trial occupied more than two days, \$10.00; total, \$65.00.

The clerk disallowed all of these items and the defendant moved for a retaxation, which was granted, the Special Term allowing all the items thus rejected by the clerk. The plaintiff appealed to the Appellate Division where the order of the Special Term was reversed, the court holding that the defendant was not entitled to any statutory costs.

The learned court opens its opinion with this statement: "If the question presented by this appeal were a new one it might well be held that under section 3372 of the Code of Civil Procedure a landowner who is awarded for his property more than was offered to him by the party seeking to condemn it, is entitled to recover costs as though a trial had been had. But a different view has been so often taken by courts of concurrent jurisdiction that we deem a contrary rule to be established by authority."

This statement is followed by the citation of three authorities which will be presently examined.

It will be profitable to consider at the outset, briefly, the scheme of the Condemnation Law as to trials before the court and the commissioners.

A proceeding under this statute is instituted by a petition which is to be taken as a complaint (§ 3360). Upon presentation of the petition the owner of the property may appear and interpose an answer (§ 3365). The issues raised by the petition

and answer may be tried by the court or sent to a referee (§ 3367). After such trial judgment shall be entered, pursuant to the direction of the court, or referee, and if in favor of the defendant the petition shall be dismissed, with costs, to be taxed by the clerk at the same rates as are allowed, of course, to the defendant prevailing in an action in the Supreme Court, including allowances for proceedings before and after notice of trial (§ 3369).

It is to be observed that the foregoing practice applies exclusively to the conduct of a case where the defendant serves an answer.

Section 3372 regulates the practice where no answer is interposed, but an offer is either made or not made. This section opens with the following language: "In all cases where the owner is a resident and not under legal disability to convey title of real property, the plaintiff, before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which cannot be given in evidence before the commissioners, or considered by them. The owner may, at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition, and take and hold it for the public use therein specified; if the order is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer, with interest from the time it was made, no costs shall be allowed to either party."

We now come to that portion of the section applicable to the case at bar: "If the compensation awarded shall exceed the amount of the offer, with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the

costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded."

The remainder of the section has no bearing upon this discussion.

The defendant's case falls precisely within the letter and spirit of the provision last quoted.

The petitioner served an offer, which defendant did not accept, but on the contrary recovered nearly seven times the amount thereof.

As before pointed out, the Condemnation Law provides for two forms of trial; if an answer is served the trial is before the court or a referee, and the defendant, if successful, is allowed costs as of course in an action.

If there is no answer interposed, no offer made, or if made not accepted and the defendant recovers a larger sum than the amount named therein, or recovers in absence of offer, he is allowed costs "to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded."

The authorities cited by the learned Appellate Division are as follows: *Manhattan Railway Co. v. Kent* (80 Hun, 559; affirmed, 145 N. Y. 595, without opinion).

An inspection of the record in the above case shows that the proceeding was not governed by the provisions of section 3372.

As already pointed out, that section applies only where the owner is a resident and not under any legal disability to convey title to real property.

The record shows, by the petition instituting the proceedings, that there were certain persons and classes of persons

not in being, who upon their coming into being would have interests in the property sought to be condemned, and upon the presentation of the petition application was made to the court for the appointment of an attorney to represent such persons and classes of persons in the proceedings. Such attorney was duly appointed and he interposed an answer on behalf of the possible infants not in being. After issue was joined a referee was duly appointed to determine the truth of the allegations contained in the petition. Thereupon a trial was duly had under section 3367 of the Code. Thereafter commissioners were appointed to ascertain the compensation to be made to the defendants therein. The defendants were unsuccessful in their efforts to tax the costs of an action in the proceeding before the commissioners, the courts holding that under the circumstances it was a mere assessment of damages. No part of this proceeding was under section 3372 of the Code. The trial, as already pointed out, was under section 3367, and the proceedings before the commissioners were a mere assessment of damages at the foot of the judgment entered at the trial.

The next case cited is *City of Johnstown v. Frederick* (35 App. Div. 44). In that case, upon the presentation of the petition of plaintiff for the condemnation of the real estate therein described, the defendants interposed an answer. A trial was had before a referee, and on his report judgment was entered in favor of the plaintiff. It was there held that the assessment of damages before the commissioners after this judgment did not entitle defendants to costs as in the trial of an action. The trial was under section 3367 of the Code.

The last case cited is *Village of St. Johnsville v. Cronk* (55 App. Div. 633). In that case no answer was served and no offer was made by the petitioner. The absence of an offer distinguishes it from the case at bar. The able dissenting opinion of Mr. Justice KELLOGG, however, makes it clear that the case was governed by section 3372 and was improperly decided.

The foregoing cases are distinguishable from the one at bar.

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Statement of case.

We are not dealing, at this time, with proceedings before the commissioners where the case has proceeded to judgment after answer under section 3367, or where no offer is made by plaintiff under section 3372.

The provisions of section 3372 are very clearly expressed and there is no occasion for construction.

The appellant was entitled to have his costs taxed at \$65.00, made up of the items allowed by the Special Term.

The following questions have been certified to us, all of which we answer in the affirmative :

" *First.* Did the Legislature in enacting title 1 of chapter XXIII of the Code of Civil Procedure and the acts amendatory thereof and supplementary thereto intend to grant a defendant, entitled to costs under section 3372 of said chapter, the same amount as costs as a defendant is entitled to under section 3251 of the Code when he has prevailed in an action in the Supreme Court after a trial ?

" *Second.* Is the defendant, under the facts in this case, entitled to ten dollars costs as for proceedings before notice of trial and fifteen dollars after notice of trial ?

" *Third.* Is the defendant, under the facts in this case entitled to thirty dollars costs as for a trial of an issue of fact and ten dollars as for a trial occupying more than two days ? "

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs.

PARKER, Ch. J., O'BRIEN, MARTIN, VANN, CULLEN and WEENER, JJ., concur.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
HARVEY D. MONTGOMERY, Appellant.

1. CRIMES — UXORICIDE — EVIDENCE OF REPUTATION FOR UNCHASTITY OF DEFENDANT'S ALLEGED PARAMOUR INCOMPETENT UPON THE QUESTION OF MOTIVE — CODE CR. PRO. § 542. Upon the trial of an indictment for the murder of a husband or wife specific acts, declarations, conduct and occurrences tending to show improper relations with a person of the opposite sex are competent evidence upon the question of motive;

but evidence as to the reputation for unchastity of the alleged paramour is incompetent; its reception constitutes reversible error and is not an error that can be overlooked as technical or unsubstantial under section 543 of the Code of Criminal Procedure.

2. DUTY OF TRIAL COURT AS TO A THEORY OF THE PROSECUTION WHOLLY UNSUPPORTED BY EVIDENCE. Where in order to sustain a theory of the prosecution that the defendant had quarrelled with his wife and had assaulted her with a wooden stick, fracturing her skull, and to escape exposure had shot her, a stick found in the room where her body lay is introduced in evidence, but there is an utter failure of proof to support such theory, the court should have directed the attention of the jury to that fact and should have restrained the counsel for the prosecution in his summary from commenting upon a theory that had collapsed for want of evidence; and its refusal upon the request of defendant's counsel to charge that there was no evidence that the stick had been used by the defendant in the commission of an assault upon the deceased prior to the shooting, followed by arguments of the counsel for the prosecution in support of such theory and by a charge tending to dignify the theoretical assault into a reality, constitute errors for which a judgment of conviction must be reversed.

(Argued June 16, 1903; decided October 13, 1903.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for the county of Delaware June 23, 1902, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Robert M. Moore, Edward O'Connor and C. R. O'Connor for appellant. The court committed reversible error in receiving evidence tending to establish the fact that Harriet Wood was a woman of bad repute. (*People v. Benham*, 160 N. Y. 426; *People v. Straight*, 148 N. Y. 566; *People v. Corey*, 148 N. Y. 476.) It was reversible error for the trial court to refuse, at the close of the evidence, to strike out the evidence in regard to the stick of wood which was found in the bedroom, the morning after the tragedy, on the ground that there was only one count in the indictment, and that charges the killing to have been accomplished by a gunshot wound through the head, and not otherwise, and that such evidence was incompetent and inadmissible. (*People v. Dumar*, 106 N. Y. 502; Code Civ. Pro.

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§§ 278, 279; *People v. Klipfel*, 160 N. Y. 374; *People v. Perkins*, 153 N. Y. 586.)

George A. Fisher, District Attorney (Edwin D. Wagner of counsel), for respondent. The exceptions taken by the defendant to the evidence relating to a maple stick found on the bureau in the bedroom where the tragedy was committed, to the refusal of the court to strike it out, to the remarks of counsel in summing up, and to some portions of the charge relating to the same stick, cannot be sustained. (*People v. Smith*, 172 N. Y. 228; *People v. Newfield*, 165 N. Y. 43; *People v. Wennerholm*, 166 N. Y. 567; *Greenfield v. People*, 85 N. Y. 75; *People v. Sullivan*, 173 N. Y. 122; Rogers on Expert Testimony [2d ed.], 486, § 207.) The evidence bearing upon the relations existing between the defendant and one Harriet Wood, both before the marriage of Montgomery to his second wife and during their wedded life, was properly received. (*People v. Harris*, 136 N. Y. 433; *People v. Buchanan*, 145 N. Y. 1; *People v. Scott*, 153 N. Y. 40; *People v. Benham*, 160 N. Y. 402, 437.)

WERNER, J. The gruesome tragedy out of which this appeal arises took place in the town of Hobart, Delaware county, on the 30th day of March, 1901, when Amelia B. Montgomery came to her death by means of a bullet wound inflicted by her husband, the defendant, who was subsequently tried and convicted upon the charge of murder in the first degree.

The death and its cause having been established beyond controversy, the dominating issue of the trial was whether the act of the defendant proceeded from a conscious, sane, responsible mind, or whether it was an accident due to a seizure, said to be epileptic in its nature, as a result of which the defendant unconsciously or involuntarily caused his wife's death. Much evidence was adduced upon this issue. The prosecution presented a case which tended to invest the defendant's act with the elements of motive, premeditation, deliberation and sanity. The defense sought to establish the irresponsibility of the defendant, but, as the sequel shows, without success.

If, therefore, the sole question presented by this record were whether the verdict is supported by the weight of the evidence, we could not reverse the judgment without invading the province of the jury, for there was competent evidence upon every branch of the case which raised a substantial issue of fact. There are presented for our consideration, however, many exceptions taken by the defense to the rulings of the learned trial court, and, after a careful examination of them all, we have arrived at the conclusion that two of these rulings appear to be so seriously erroneous as to necessitate a new trial. In view of this fact and of the concession of the defense that the killing of Amelia B. Montgomery was the act of the defendant, we may safely and materially shorten the discussion of the case by confining our review to the matters which bear upon these two rulings.

The proof as to motive or motives proceeded along several distinct lines. Upon one branch of this question the prosecution produced evidence showing that during nearly the whole of the interval between the death of defendant's first wife in June, 1896, and his subsequent marriage in March, 1900, one Harriet Wood had lived with him as his housekeeper. She remained in his employ until the early autumn of 1900, or several months after his second marriage. It was contended for the prosecution that during this interval, between 1896 and 1900, the defendant had formed an illicit alliance with Harriet Wood, which, if not actually continued after defendant's second marriage, was covertly cherished by him, causing discord between him and his second wife and creating one of the motives which inspired the commission of the crime charged in the indictment.

In support of this theory the prosecution adduced evidence showing that in the spring of 1900, the defendant, with three hired men and Harriet Wood, went to the Kaaterskill mountains, where the defendant had a contract to supply certain hotels and cottages with dairy products during the summer season, and lived there together for three or four days before the defendant went back to Hobart for his wife. These hired

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men testified that they slept upstairs but that the defendant and Harriet Wood did not sleep there; that they did not know where they slept and that there was only one bed downstairs that they knew of. One of the men, Haynor, testified to a conversation with the defendant in which the latter took him to task for talking about Harriet Wood at the neighboring hamlet of Jewett Center, and said, "there is no use of going to my wife and reporting anything concerning anything that has been or what is done; what a woman doesn't know never made her head ache and such little things wont come out very well." This witness also testified that on one occasion when he was near the barn and Harriet Wood was outside of the house, the defendant called to her from a window, where he stood with his body nude as far down as the chest; that she went to the window and there the two conversed while he stood thus exposed. He also referred to a conversation between the defendant and his wife disclosing some difference of opinion between the latter and Harriet Wood, as to which one should deliver cream and butter to Mrs. Surgraft, and he stated that defendant sometimes sent his wife away with cream and butter in the evening so that she did not return until the following morning.

Another witness, Hollicus, who worked for the defendant from February to the latter part of May in 1900, testified to a conversation between the defendant and Harriet Wood shortly before the latter left the former. This witness stated that the defendant came into the barn at milking time, when Harriet Wood said to him: "Harvey, I didn't think you would give me up in this way, or as easy as that, and he burst out crying and called her in one end of the barn and went talking to her. I could not hear what he said. After they got out there I don't know how long they talked; should think fifteen or twenty minutes, half an hour, or something like that. She went away next day. Harvey Montgomery took her away. They went in the morning, he came back next day; was gone over night." This witness also testified that Mrs. Montgomery objected to Harriet Wood's driving her horse.

Another hired man, Gray, testified that defendant requested him to ask Harriet Wood to stay with defendant when she was talking of leaving.

There was also evidence to the effect that in the January preceding the homicide the defendant went several times to a Mrs. Clark in Hobart to ascertain if she did not want a good girl for housework, with the result that Harriet Wood commenced work at Clark's on February 1st, 1901. This was closely followed by another visit from the defendant, at which he arranged with Mrs. Clark to furnish her with milk, and continued to do so until after the homicide. During this period defendant called at Clark's a number of times and usually saw Harriet Wood.

It was further shown that on the day of the homicide there was a conversation between the defendant and one Stevens, in which the former asked the latter and his wife to go up and take charge of the Kaaterskill contract, and when Stevens demurred on the ground of his incompetency, the defendant said he would write a letter to Harriet Wood and get her to go with them, to which Stevens replied that his wife would not go with her. Several witnesses also testified that immediately after the homicide Harriet Wood and the doctor were the only persons whom the defendant requested to have sent for.

To offset the force and effect of the foregoing circumstances upon the question of motive, the defense invoked a number of explanations and facts which appear in the record. We shall refer to only a few of them. The defendant was a man fifty-nine years of age. He was a farmer extensively engaged in raising hogs, and conducted a dairy in the Catskills. These enterprises required hired men, some of whom boarded with him. He became a widower in 1896, and until his marriage in 1900 he needed a housekeeper. In these conditions he secured the services of Harriet Wood, who remained with him for a number of years. Members of defendant's family and others who had worked for him testified that they had never witnessed any improper conduct between him and Harriet Wood. From these and other matters which bore

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upon the relations of the defendant and Harriet Wood, the defense argued that, even admitting all that was testified to in this behalf by the witnesses for the prosecution, nothing had been shown that was at all inconsistent with such an innocent and respectable intimacy as would be the natural outcome of a long period of constant association between a man and woman under the same roof in a rural community. The specific facts and circumstances thus presented by the prosecution and defense, respectively, to throw light upon the relations of the defendant and Harriet Wood, raised a legitimate issue upon the question of motive which it was proper to submit for the consideration of the jury.

But the prosecution, not content with seeking to establish specific improprieties between the defendant and Harriet Wood, went further and threw into the balance the latter's reputation for unchastity. Six witnesses testified that her reputation in that regard was bad. That this evidence seems to have been based largely, if not entirely, upon her association with the defendant is not without significance, for if the speech of people in that community, as reflected in the testimony of disinterested witnesses, characterized that association as sinister or meretricious, it is readily perceivable that it may have exercised a commanding influence upon the jury in reaching a determination upon the question of motive. The evidence of Harriet Wood's reputation for unchastity was directed to the question of motive and to no other. That question obviously bore a very intimate relation to the defendant's plea of irresponsibility, and it seems to be reasonably clear that if it was error to admit the evidence of Harriet Wood's reputation, it cannot be assumed to have been harmless to the defendant. We address ourselves, then, to the question whether the evidence of Harriet Wood's reputation for unchastity was competent.

It is the settled law of this state that upon a trial for the murder of a husband or wife, the improper relations of the accused survivor with persons of the opposite sex may be given in evidence upon the subject of motive. (*People v.*

Hendrickson, 8 How. Pr. 404; *People v. Nileman*, 8 N. Y. S. R. 300; *Stephens v. People*, 19 N. Y. 549; *People v. Stout*, 4 Park. Crim. Cas. 71; *Pierson v. People*, 79 N. Y. 424; *People v. Harris*, 136 N. Y. 423; *People v. Benham*, 160 N. Y. 402; *People v. Scott*, 153 N. Y. 40; *People v. Buchanan*, 145 N. Y. 1.) The same rule obtains in many other states. (*State v. Watkins*, 9 Conn. 47; *Hall v. State*, 40 Ala. 698; *Johnson v. State*, 94 Ala. 35; *O'Brien v. Commonwealth*, 89 Ky. 354; *State v. Duestrow*, 137 Mo. 44; *Duncan v. State*, 88 Ala. 31; *Pettit v. State*, 135 Ind. 393; *St. Louis v. State*, 8 Neb. 405; *Stricklin v. Commonwealth*, 83 Ky. 566, and *People v. Brown*, 130 Cal. 591.) It is supported in such text works as Lawson on Presumptive Ev. (p. 495); Wills on Cir. Ev. (6th Am. ed. p. 41); Burrill on Cir. Ev. (p. 285); Underhill on Crim. Ev. (sec. 323), and is doubtless the law wherever the principles of the common law prevail. The reason of the rule has been stated in great variety of language, but the substance of it is that evidence of this character tends to repel the presumption of love and affection that arises out of the marital relation, and to establish a motive for the desire to get rid of one who, under normal conditions, would be the natural object of kindness and protection. Thus, as we have said, the facts and inferences which were based upon specific occurrences, bearing upon the relations of the defendant and Harriet Wood, were properly received in evidence. Some of them, it is true, might have been discarded by the jury as of too little probative weight and force, but they were, nevertheless, competent for what they were worth.

The prosecution seeks to justify the evidence of Harriet Wood's reputation for unchastity under the rule above referred to, but it is important to note that not a single case has been cited by counsel, nor brought to light by the research of the court, which holds that such evidence is competent. Counsel for the prosecution cite the cases of *Harris*, *Buchanan*, *Scott* and *Benham* (*supra*) to sustain their contention, but none of them go further than to declare the well-established general rule that specific acts, declarations, con-

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duct and occurrences tending to show improper relations with a person of the other sex are admissible evidence against one accused of the murder of husband or wife. The fact that the reported cases and the text books are, at this late day, barren of any discussion upon the admissibility of evidence as to the reputation for unchastity of the paramour of one accused of wife murder, is in itself a cogent argument for the inadmissibility of such evidence.

It would serve no good purpose, and would tend to undue prolixity, to attempt a statement of the different classes of cases in which evidence of personal reputation is admissible. It is enough to say that it is only competent where character is in issue. Since character, which is what a man is, cannot be proven; the law makes a virtue of necessity and resorts to proof of reputation, or what people say of a man, as the next best thing. Evidence of reputation is one of the exceptions to the rule excluding hearsay evidence and, in common with all the exceptions to that rule, is resorted to only because more direct evidence is not obtainable. To this very general statement it may be added that, usually, the only character or reputation that can ever be in issue is that of a party or a witness. There are a few exceptions not germane to this discussion. In the case at bar, Harriet Wood was neither a party nor a witness. Her character was not in issue. Proof of her reputation for unchastity served no purpose except, possibly, to prejudice and inflame the minds of the jury against the defendant. All the facts and circumstances bearing upon the relations of the defendant and Harriet Wood were in evidence. If they pointed with reasonable certainty to a guilty alliance between the two, it added nothing to their weight and cogency to go further and prove the woman's reputation for unchastity. If, on the other hand, these facts and circumstances, standing alone, might have been regarded by the jury as entirely consistent with an innocent and respectable intercourse between this man and woman, it must follow that they furnished no evidence of a motive for murder without being supplemented by proof of the woman's bad reputation. In

either event this evidence had a tendency to create a prejudice against the defendant, and to injure him, without proving a single fact against him. The specific occurrences in which Harriet Wood and the defendant were shown to have figured together, after the latter's second marriage, were competent evidence against him, but the former's reputation was not a legitimate issue in the case. Even if it had been, there was no evidence that the defendant knew of it and that, of itself, was a sufficient reason why it should not have been used against him. It is to be observed, moreover, that this evidence of Harriet Wood's reputation, which was not limited to the period succeeding defendant's marriage to the deceased, related, in part at least, to a period as to which evidence of specific acts of intimacy between Harriet Wood and the defendant would have been incompetent against the latter under the rule in *People v. Straight* (148 N. Y. 570) where it was held that it was not competent to prove defendant's relations with his alleged paramour during his separation from his first wife, from whom he was afterwards divorced, for the purpose of showing a motive to kill his second wife whom he married after the occurrences proved. So much might be said against the competency of this evidence of Harriet Wood's reputation that it is more difficult to choose than to find reasons for condemning it, and we shall leave the discussion of this branch of the case with the statement that we regard it as utterly incompetent. Since several possible motives were assigned for the alleged murder, we are unable to say which particular one, if any, the jury may have regarded as the true one, but we cannot doubt that if they looked for a motive in the relations of the defendant and Harriet Wood the evidence of her reputation proved a controlling factor in the finding of the verdict of guilty. Thus we are driven to the conclusion that the error in receiving this improper evidence is not one that we can overlook as technical or unsubstantial under the powers conferred upon us by section 542 of the Code of Criminal Procedure.

We think it was error also for the trial court to refuse to

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charge, upon the request of counsel for the defense, that there was no evidence that a certain wooden stick or bludgeon or rolling pin, as it has been variously described, had been used by the defendant in the commission of an assault upon the deceased prior to the shooting. The force of this ruling becomes apparent upon a brief recital of the facts relating to that part of the case.

The deceased was found in bed with a severe fracture of the skull surrounding a bullet wound which entered the head at the right temple bone and had its exit behind and below the ear near the occipital bone. Her eyes were closed, the bed-clothes were tucked under her left side and shoulder, and her hair, contrary to her usual custom upon retiring, was coiled about her head in the same manner as she was wont to wear it during the day. Her face, hair and the pillow upon which she lay were badly scorched. The stick of wood in question was found lying upon a bureau in the room. As there were no eye-witnesses to the shooting, and there was no superficially apparent motive for it, the prosecution naturally seized upon every theory that might give a clue to the inspiration for the deed. One of the theories evolved by the prosecution was that the defendant and his wife had a quarrel over the Kaaterskill contract, a renewal of which had been obtained by the defendant on that day; that in the heat of passion engendered by this quarrel the defendant had assaulted his wife with the stick of wood or bludgeon, thus fracturing her skull, and that when the defendant realized the serious consequences of his assault he decided to kill his wife to escape exposure. The difficulty with this theory is that, beyond the existence of the stick, the renewal of the Kaaterskill contract and the manner in which deceased wore her hair, there is not a fragment of evidence to sustain it. The stick of wood bore no evidence of having been used in the commission of an assault, and was shown to have been an instrument used in the pressing of the sleeves of women's garments. The physicians who performed the autopsy, and who were called as witnesses for the prosecution, testified that there was no such abrasion or dis-

coloration of the inner skin surface as would be found in case of severe external violence from a stick or club, and that the entrance of a bullet fired at such close range as to scorch and burn the face and hair of the deceased and the bed clothing, was a sufficient cause for the fracture of the skull. There was nothing to show that there had been a quarrel between the defendant and his wife, and, in a word, there was an utter failure of evidence to support the theory that the defendant had committed an assault upon his wife before he shot her.

It is argued for the prosecution that they were entitled to lay before the jury all the circumstances connected with the homicide, and, therefore, it was competent to put in evidence the stick of wood found in the room where it occurred. That is true to the extent that the stick of wood, in and of itself, was no more and no less competent than any of the other physical surroundings of the alleged crime. It was in the use of this particular thing for a purpose not justified by the evidence that error was committed.

We do not coincide with the views of counsel for the defense, that because the indictment charged murder by means of a gunshot wound, it was error for the court to receive the stick of wood in evidence, or to permit counsel for the prosecution in his opening to present to the jury the theory that the defendant had assaulted and injured the deceased before he shot her; on the contrary, we think it was proper for the court to allow counsel to exploit that theory upon the assumption that it would be followed by evidence to support it, and in that view of the case, the stick of wood was, in the first instance, properly received in evidence. But when the proofs had been closed, and there had been a palpable failure to prove the theory of assault, the court should have sharply directed the attention of the jury to that fact, and have restrained counsel for the prosecution, in his summary to the jury, from commenting upon a theory that had collapsed for want of evidence; and then the court should have charged, as requested by defendant's counsel, that there was no evidence that the stick of wood had been used upon the deceased.

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None of these things were done. There was no admonition to the jury to disregard the opening statement of counsel for the prosecution upon the theory of assault. The court refused to charge as requested by defendant's counsel. In his summary to the jury counsel for the prosecution was permitted to say: "It may be, gentlemen, that this bludgeon was used in the argument not with the intent or purpose of taking her life, but it was used and the woman became unconscious, and this man believing that he had killed his wife had resort to the gun to finish the job. * * * Where is the evidence to show that they did not have an altercation there before she went to bed? It is a fair inquiry to say where is the evidence to show they did not. Where is the evidence to show they did? The dead woman, with her head crushed, there in bed, is evidence that at some time during that night there was a disturbance and a breach of friendliness between them. With her there in her blood some one is called upon to explain it to show what the relations were which immediately preceded this thing they called an accident. Where is the explanation? Gentlemen, where is it? Why, never a witness has testified to it."

These remarks of counsel were supplemented by the following language of the court in the course of the charge. "In the discussion of this case another motive has been suggested by the counsel for the People, and that is that the crime of murder was committed to conceal another crime. The theory of the prosecution is that Montgomery, in the heat of passion or for some other cause, struck the deceased on the head with a rolling pin which was found on the bureau at the foot of the bed after the tragedy; that the depression or indentation on the left side of the forehead was made with a blow from the instrument and that, to conceal this assault, she was afterwards placed in bed by him and shot through the head. In support of this theory evidence has been given tending to show that it was a habit of the deceased to take down her hair and braid it before retiring and that this night her hair was not down but in a coil near the top of her head. The prose-

cution claims that this fact, and the fact that the bedclothes were carefully tucked under her side; that they were not back on the side occupied by the defendant, but drawn up nearly to the pillow, as well as the position of the body, the position of the arms crossed on the abdomen, and the fact that the skull was broken and indented, shows that an assault was made before the shot was fired and before she was placed in bed. It is true that one of the physicians has testified that in his opinion the dent or depression in the forehead was caused by the bullet, but you are not bound to accept his opinion as true. You should give to this evidence such weight as you think it is entitled to in view of all the evidence in the case. As I said before, when an expert states a scientific fact, his opinion is speculative and theoretical, and he states only his belief, or where some other theory is equally consistent with the facts. If you are convinced, beyond a reasonable doubt, from all the evidence in the case, that the crime of assault was made by the defendant upon the deceased, you will then determine whether it was the moving power that impelled the defendant to shoot the deceased and, if you are convinced, beyond a reasonable doubt, that this was the motive that induced the act, you will give it such force and effect as you think it entitled to, no matter what the opinion of the physician may be as to the cause of the indentation."

We cannot say that the conduct of the trial in this regard did not affect the result. The refusal to instruct the jury that there was no evidence of an assault prior to the homicide, followed by the impassioned appeal of counsel and the solemn words of the court, which tended to dignify this theoretical assault into a reality, may well have been potent in shaping the verdict.

The judgment herein should be reversed and a new trial ordered.

PARKER, Ch. J., HAIGHT, MARTIN, VANN, CULLEN, JJ. (and GRAY, J., on first ground of error discussed), concur.

Judgment of conviction reversed, etc.

JOHN KOLB, Appellant, v. NATIONAL SURETY COMPANY,
Respondent, Impleaded with Others.

1. SUBROGATION — RIGHTS OF SURETY WHICH HAS PAID JUDGMENT RECOVERED IN TORT AGAINST SEVERAL JOINT TORT FEASORS AND HAS BEEN SUBROGATED TO RIGHTS OF THE JUDGMENT CREDITOR THEREUNDER. Where a surety company, having paid an indebtedness arising upon a judgment recovered in tort against several defendants, for one of whom it was surety upon an appeal from the judgment, has been subrogated, by an order of the court, to all of the rights and securities of the judgment creditor under the judgment, including those arising from a contract by which one of the judgment debtors agreed to pay a certain sum, either before, or upon, the final determination of the action, upon the payment of which the debtor was to be released from liability under the judgment, the surety company is entitled to collect the sum agreed to be paid by such debtor and have execution therefor, since the rule, that a judgment recovered in tort is extinguished by payment and that no tortfeasor who has satisfied such judgment can compel any of his joint wrongdoers to contribute, is based upon the principle that a court of equity will refuse to lend its aid to those who have been guilty of illegal conduct, or who do not come before it with clean hands, and, hence, such rule has no application to a surety company which, by a decree of the court, has been subrogated to the rights and remedies of the judgment creditor, and is, in effect, in the position of a purchaser of the judgment.

2. SAME — CONTRACT BY ONE OF SEVERAL JOINT DEBTORS UNDER JUDGMENT IN TORT TO PAY PART THEREOF IN CONSIDERATION OF HIS RELEASE THEREFROM — WHEN SUCH JOINT DEBTOR WILL NOT BE RELIEVED FROM CONTRACT BECAUSE OF SIMILAR CONTRACT MADE WITH OTHER JOINT DEBTORS. Where one of several judgment debtors, against whom a judgment in tort had been recovered, contracted with the judgment creditor, pending an appeal from the judgment, to pay a certain part of the judgment, in any event, in consideration of his release therefrom, such judgment debtor cannot be relieved from the agreement upon the ground that a surety company, which had paid the judgment in full and had been subrogated to the rights of the judgment creditor thereunder, had thereafter released another of the judgment debtors in consideration of the payment by him of his proportionate part of the judgment, where there was in both of such agreements, a reservation of the right to enforce the judgment against the other judgment debtors.

3. SAME — WHEN JUDGMENT DEBTOR NOT ENTITLED TO INJUNCTION RESTRAINING SURETY FROM ENFORCING HIS AGREEMENT TO PAY PART OF THE JOINT JUDGMENT. Where the surety company, subrogated to the rights

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of the judgment creditor under such judgment, has issued an execution against the judgment debtor who agreed to pay a certain sum upon the judgment, in any event, in consideration of his release therefrom, the latter cannot maintain an action in equity to restrain the enforcement by the surety company of the judgment, through the execution, and to compel the discharge of the judgment, since a court of equity will not listen to one seeking to be relieved of his liability under a joint judgment in tort, nor will it assist him, in violation of his express agreement, to escape the liability which he had contracted to pay and thereby recognized as existing under the judgment against him.

Kolb v. Nat. Surety Co., 78 App. Div. 619, affirmed.

(Argued June 17, 1903; decided October 13, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 23, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term.

In December, 1897, Frank Smith recovered a judgment against this plaintiff and the defendants, Theodore G. Smith and Stephen W. Adwen, for \$1,125.13, in an action to recover damages for wrongful and malicious conduct. Adwen appealed and gave an undertaking, with this respondent, the National Surety Company, as surety. Subsequently, his appeal was dismissed and the judgment was affirmed. This plaintiff, Kolb, and Theodore Smith, defendants in the action, also, appealed and without undertaking; but, pending the appeal, Kolb settled with Frank Smith, the judgment creditor, by an agreement to pay \$400, in any and all events; which sum, at the election of Smith, was payable before, or upon, the final determination of the action and, upon payment whereof, he was to be released. The agreement reserved Smith's claim against Adwen, to the extent of, at least, one-third of the judgment. Eventually, all appeals were dismissed; whereupon Smith, the judgment creditor, in September, 1898, in lieu of enforcing his judgment by execution, commenced an action against the surety company to recover the whole

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Points of counsel.

amount of his judgment and in that action had a judgment, in February, 1899, for \$1,362.58, damages and costs. Subsequently, upon application of the defendant, the surety company, it was ordered that, upon its payment to Smith of the full amount of his judgment, it should be subrogated to all of his rights under the judgment against Kolb and the other original judgment debtors and to all securities, including his contract with Kolb. Smith complied with the order, assigned his judgments and his contract and received payment in full of what was due him. Thereupon, the surety company, being possessed of Smith's judgment, issued execution to the sheriff directing him to collect from Kolb \$400 and from Theodore Smith \$648.30. Adwen, the other judgment debtor, had paid the surety company \$593.13, upon its agreement not to enforce the judgment further against him. That agreement, also, reserved to the company the right to collect the balance due on the judgment against the other judgment debtors. Theodore Smith was insolvent and the amount named in the execution against him represented the balance remaining unpaid upon the judgment, after deducting the sum of \$400, agreed to be paid by Kolb and the sum of \$593.13, paid by Adwen. Upon the issuance of the execution, Kolb, at once, commenced this action against the surety company and the others to restrain the enforcement by the surety company of the judgment, through the execution, and to compel the discharge of the judgment. At the Special Term the defendant, the surety company, was held to be entitled to enforce the judgment assigned to it by Frank Smith, and the plaintiff's complaint was dismissed, upon the merits. The judgment entered upon that determination was affirmed by the Appellate Division, in the fourth department, and the plaintiff, Kolb, has appealed to this court.

Charles Van Voorhis for appellant. The payment of the judgments in the malicious prosecution action extinguished those judgments, and they could not be kept on foot for any

purpose. It is settled beyond dispute that contribution cannot be enforced among wrongdoers, and that payment by one extinguishes the judgment as to all. (*Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18; *Wehle v. Haviland*, 42 How. Pr. 399; *Andrew v. Murray*, 33 Barb. 354; *Plasson v. Shelton*, 1 M. & W. 504.) Adwen could not compel contribution from his joint tort feasons, and the surety company under the doctrine of subrogation could acquire no better right than its principal Adwen had. (*Stewart v. Sonneburg*, 98 U. S. 187.) If it be conceded that the surety company, as assignee and owner of the judgment in the malicious prosecution action, was subrogated to all the rights of Frank Smith, the plaintiff in that action, when it released the judgment debtor Adwen, it released his joint debtors Kolb and Frank Smith, and extinguished the judgments as to them. (*Mitchell v. Allen*, 25 Hun, 543; *Knickerbocker v. Colver*, 8 Cow. 111; *Barret v. T. A. R. R. Co.*, 45 N. Y. 635; *De Long v. Curtis*, 35 Hun, 94; *Woods v. Pangburn*, 75 N. Y. 498.)

Nathaniel Foote for respondent. The surety company, on payment of the judgment recovered against it upon the undertaking, which it signed as surety, was rightfully subrogated to the judgments and contract held by Frank Smith, for the same debt for which the surety company became surety. (*Bailey v. Bussing*, 28 Conn. 455; *Eddy v. Traver*, 6 Paige Ch. 521; 2 Beach on Mod. Eq. Juris. 797-821; *Hays v. Ward*, 4 Johns. Ch. 123; *Selz v. Unna*, 6 Wall. 327.) The agreement made between the surety company and Adwen, set forth in the 6th finding of fact, by which upon payment by Adwen of \$593.13, the surety company agreed not to enforce from Adwen the collection of any further sum upon the judgment against him and his associates, without prejudice, however, to the right of the surety company to collect the balance due on the said judgment from the other judgment debtors, did not satisfy the judgment as against Kolb and Theodore G. Smith, as regards the balance unpaid

thereon. (*Irvine v. Milbank*, 56 N. Y. 635; *Coonley v. Wood*, 36 Hun, 559; *Mitchell v. Allen*, 25 Hun, 543.)

GRAY, J. The appellant argues that, when the surety company paid the judgment recovered by Smith, the effect was the same as though Adwen, for whom it was surety, had paid the judgment against him and his codefendants; that, as a judgment recovered in tort, it was extinguished by the payment and that no right of contribution against this plaintiff, or Theodore Smith, who were joint tort feassors with Adwen, survived, or existed. The general proposition is true that there is no right of contribution as between wrongdoers, which can be enforced; for a court of equity, which, alone, would have jurisdiction of such an action, will refuse to lend its aid to those who have been guilty of illegal conduct, or who do not come before it with clean hands. The legal principle, upon which contribution among those jointly indebted rests, is as just when wrongdoers are concerned, as in other cases where it is allowed, and the refusal of a court to entertain an action to compel it is based upon considerations of the nature of the complainant's liability and the association of the parties who incurred it. That this doctrine of equity would, or should, exclude from relief a surety, who, like this respondent, has been decreed by the court to be entitled to be subrogated to the rights and remedies of the judgment creditor, and is, in effect, in the position of a purchaser from the latter of the judgment, I do not believe. If there is a precedent, I do not find it, for such extreme application of the doctrine. In the first place a surety who pays a debt is, by the well-settled law of the land, entitled to stand in the shoes of the creditor, or to be subrogated to all of his rights, remedies and securities, with respect to any fund or lien; not upon any contractual basis, but upon established principles of equity, or, as said by Chancellor KENT in *Cheesebrough v. Millard* (1 Johns. Ch. 412), "on mere equity and benevolence." In the second place the surety in this case does not

come within the reprobation of the court in any aspect; for the principle of equal contribution being a just one, even as between wrongdoers, and the denial of its recognition resting upon especial grounds, which would be peculiar to the complainant in the bill for equitable relief, this surety is not embarrassed by asking for that which the court had, in the Adwen proceeding, accorded to it. It is innocent of any wrongdoing. That it has paid an indebtedness, arising upon a judgment in tort against several, for one of the judgment debtors should not, as a matter of natural justice, deprive it of the right, approved as it is by a decree of the court, to compel the joint debtors to contribute proportionately to the payment of the judgment now its property. The right of subrogation is founded in natural justice and it should be given effect upon purely equitable considerations.

But, if my conclusion in this respect were incorrect, there is the further aspect of this case, that this surety, as against this plaintiff, was seeking to compel payment by him of the proportion of a judgment, which he, by his agreement, had promised to pay in any event and had recognized as a debt. The surety is acting most equitably and whether it be regarded as standing for Adwen, or not, it is demanding, only, that which the agreement of the appellant provided for. Both in that agreement, as in that with Adwen, the reservation of the surety's rights to hold the other debtors prevented a payment upon the judgment by either from operating to discharge it, as against the others equally liable therein. (See *Gilbert v. Finch*, 173 N. Y. 455.)

But there is another conclusive objection to the maintenance of this action and that is that this appellant does not commend himself to the equitable consideration of the court. As a joint tortfeasor, he is subject to the operation of the rule that a court of equity will not listen to one seeking to be relieved of his liability under a joint judgment in tort. He has no more right to demand equitable intervention in his behalf, than if the judgment creditor had assigned his judgment to some

stranger to the parties and the purchaser was enforcing it as against him as one of the judgment debtors. How can the appellant come into a court of equity and ask that he be relieved from paying a proportion of the judgment, which he had agreed to pay and which, in fact, is less than what might be exacted from him as his proportion? His position is highly inequitable; whether he be regarded as one of several joint tort feorsors, seeking immunity from contribution; or whether he be regarded as violating his express agreement and as seeking to escape the liability he had recognized as existing under the judgment against him.

I think the judgment appealed from is right and that it should be affirmed, with costs.

PARKER, Ch. J., HAIGHT, VANN, WERNER, JJ. (and CULLEN, J., on last ground), concur; MARTIN, J., absent.

Judgment affirmed.

In the Matter of the Petition of the BOARD OF WATER COMMISSIONERS OF THE VILLAGE OF WHITE PLAINS, Respondent, to Acquire Property of the WESTCHESTER COUNTY WATER WORKS COMPANY et al., Appellants.

1. WHITE PLAINS (VILLAGE OF)—INVALIDITY OF CONTRACT MADE BY AUTHORITIES THEREOF TO PURCHASE PROPERTY OF WATER WORKS COMPANY—AGREEMENT AS TO APPRAISAL BY ARBITRATORS. Where an agreement made by and between a water works company and the authorities of the village of White Plains on July 1, 1886, in which the village agreed to take and the water works company agreed to supply water for municipal and fire purposes for a period of five years at a stipulated price, contains a clause providing that the village should have the right at the end of stipulated periods to purchase the water works by giving the company one year's notice of such intention and paying to said company a valuation to be determined and appraised by a board of arbitrators, chosen as therein provided, such valuation in no case to exceed the cost of the works more than ten per cent, the purchase clause is *ultra vires* and void, and cannot be enforced by or against the village.

2. SAME—APPRAISAL OF PROPERTY OF WATER WORKS COMPANY MADE BY COMMISSIONERS IN CONDEMNATION PROCEEDINGS—ILLEGAL AND ERRONEOUS WHEN BASED UPON INVALID CONTRACT OF PURCHASE.

Where the board of water commissioners of the village of White Plains, appointed by the statute (L. 1896, ch. 769), with power to supply the village with water and to acquire by purchase or condemnation all water, water rights and property necessary therefor, whether owned by individuals or water companies, instituted condemnation proceedings pursuant to such statute to acquire the property of a water works company then supplying the village with water under the contract of July 1, 1886, and the commissioners appointed in such proceeding instead of appraising such property, including the good will and franchise of the company, at its full value, as provided by the statute, refused to be governed thereby and determined the value of the real property and plant of the company in the manner provided for by the contract of July 1, 1886, without any award for the franchise rights of the company, such determination and award are illegal and erroneous and must be set aside and a new appraisal ordered before new commissioners to be appointed by the court.

Matter of Bd. of Water Comrs. of White Plains, 71 App. Div. 544, reversed.

(Argued June 18, 1903; decided October 13, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 7, 1902, which affirmed an order of Special Term confirming a report of commissioners of appraisal in proceedings instituted by the board of water commissioners of the village of White Plains to acquire all the property and franchises of the Westchester County Water Works Company.

The facts, so far as material, are stated in the opinion.

David McClure for Farmers' Loan and Trust Company, appellant. The petition should have been dismissed as not filed by a person entitled to petition for the condemnation of real property. (L. 1896, ch. 769, § 3; Code Civ. Pro. § 3359; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Raub v. Comrs.*, 66 How. Pr. 368; *N. Y. B. D. Co. v. Mayor, etc.*, 8 Hun, 247; *Swift v. Mayor, etc.*, 83 N. Y. 533; *Bronk v. Riley*, 2 N. Y. Supp. 266; *Matter of R. W. Comrs.*, 66 N. Y. 413.) The action of the commissioners was based upon an erroneous principle of law. (*Bohm v. M. E. R. Co.*, 129 N. Y. 576; Cooley Const. Lim. § 565; *Henderson v. N. Y. C. R. R. Co.*,

78 N. Y. 433; 6 Am. & Eng. Ency. of Law, 568; *Newman v. M. E. R. Co.*, 118 N. Y. 623; *Matter of City of Brooklyn*, 143 N. Y. 596; *Moulton v. N. W. Co.*, 137 Mass. 163; *S. W. W. Co. v. Vil. of Skaneateles*, 161 N. Y. 154.)

Louis Marshall for the Westchester County Water Works Company et al., appellants. As a result of the proceedings taken pursuant to chapter 737 of the Laws of 1873 the water company acquired a valid franchise, unlimited as to time, to supply the village of White Plains and its inhabitants with pure and wholesome water. (*Matter of City of Brooklyn*, 143 N. Y. 596; *People v. O'Brien*, 111 N. Y. 1.) The extent and nature of the franchise must be determined by the instrument creating it, and not by any instrument subsequently executed. (*B. G. L. Co. v. Claffy*, 151 N. Y. 24; *Thomas v. R. R. Co.*, 101 U. S. 71; *C. T. Co. v. Pullman Co.*, 139 U. S. 43; *O. R. R. Co. v. O. R. R. Co.*, 130 U. S. 28; *Snell v. Chicago*, 152 U. S. 199; *Black v. D. & R. C. Co.*, 22 N. J. Eq. 130; *Abbott v. A. H. R. Co.*, 33 Barb. 578; *People v. Ballard*, 134 N. Y. 269; *Legrand v. M. M. Assn.*, 80 N. Y. 638; *Dupee v. B. W. Co.*, 114 Mass. 37.) The provision of the contract of July 1, 1886, which assumes to limit the compensation of the water works company to the cost of its works and ten per cent in addition thereto, must be entirely disregarded. (*Craig v. Wells*, 11 N. Y. 315; *Moss v. Stanton*, 51 N. Y. 649; *Dennison v. Taylor*, 15 Abb. [N. C.] 439; *C. & G. E. R. R. Co. v. Dane*, 43 N. Y. 240; *Stern v. Ladens*, 47 App. Div. 331; *Moffett v. City of Goldsborough*, 52 Fed. Repr. 560.) The "purchase" clause of the contract of 1886 has no application whatsoever to these proceedings, and the appraisers had no right to consider the question of "cost." They were bound to award the full value of the real estate, plant and franchise of the water company as a going concern, with an earning capacity in excess of its operating expenses. (*M. N. Co. v. United States*, 148 U. S. 312; *N. W. Co. v. Newbury-*

port, 168 Mass. 541; *Matter of City of Brooklyn*, 143 N. Y. 596; *S. W. W. Co. v. Vil. of Skaneateles*, 161 N. Y. 154; 184 U. S. 354.) The petitioner, the board of water commissioners of the village of White Plains, had no legal capacity to sue, in that it is not a natural person or a corporation, and chapter 769 of the Laws of 1896 did not authorize the institution of proceedings in condemnation by such board or otherwise than in the corporate name of the village of White Plains. (Code Civ. Pro. §§ 3358, 3360; *A. E. Bank v. Sage*, 6 Hill, 562; *Matter of Marsh*, 71 N. Y. 315; *Craig v. Town of Andes*, 93 N. Y. 405; *Matter of B., etc., R. Co.*, 79 N. Y. 71; *Matter of N. Y. C. Co.*, 104 N. Y. 1; *Matter of B., W. & N. R. R. Co.*, 72 N. Y. 245; *Matter of N. Y. C. & H. R. R. Co.*, 70 N. Y. 191.)

Henry T. Dykman for respondent. The claim that the petition should be dismissed, as not filed by a person entitled to petition for the condemnation of real property, cannot be maintained. (L. 1896, ch. 769, § 3; *Matter of R. W. Co.*, 66 N. Y. 413.) The claim that the purchase clause set forth in the permission to organize the corporation and incorporated in the contract was not binding on the water company or the trustee for the bondholders, lacked mutuality and was *ultra vires*, cannot be maintained. (*Matter of City of Brooklyn*, 143 N. Y. 596; *Wick v. F. P. R. S. R. Co.*, 50 N. Y. Supp. 479; *Legrand v. M. M. Assn.*, 80 N. Y. 638; *South Wales v. Redmond*, 10 C. B. [N. S.] 682; Beach on Corp. 963, 994; *C. & O. R. R. Co. v. Miller*, 114 U. S. 176.)

HAIGHT, J. These proceedings were instituted on the 2d day of September, 1896, by the board of water commissioners of the village of White Plains, pursuant to chapter 769 of the Laws of 1896, to acquire all of the real estate, property and franchises of the Westchester County Water Works Company. They resulted in the appointment of commissioners of appraisal who filed their report, awarding as damages for the

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taking of such property the sum of \$103,298, upon which a final judgment of confirmation has been entered. Upon a review of the judgment the Appellate Division reversed so much of the order as refused the application for an amended report, and required an amended report to be filed by the commissioners of appraisal. Thereupon the commissioners, in obedience to such requirement, made a further report, in which they stated that in making their award they intended to cover whatever rights to transact future business in White Plains the Westchester County Water Works Company possessed, but were, however, "unanimously of the opinion that the company did not possess such a franchise as would entitle it to an award based upon its annual earnings, or its future business prospects; the restrictive conditions with which, by the contract of July 1st, 1886, the company's franchise was encumbered, having, in our opinion, reduced the value of this franchise to a sum necessarily insignificant as compared with the value which an unrestrictive franchise would have had." And then concluded with the statement that "We considered that an award of, approximately, one hundred thousand dollars would amply cover the value of such plant and real estate, liberally estimated. The balance of our award was intended to represent in part a slight overpayment for the material properties taken, and in part a payment for the nominal and practically valueless remaining rights which the company possessed at the time of the commencement of these proceedings." Upon the filing of this report the Appellate Division affirmed the judgment entered upon the order of the Special Term.

On the 14th day of May, 1886, John F. Moffett and others requested the board of trustees of the village of White Plains and the supervisors of the towns of Greenburg and White Plains to consider their application to supply the village of White Plains and its inhabitants with pure and wholesome water, and to grant them permission to form a water works company, under chapter 737 of the Laws of 1873, and acts

amendatory thereof and supplementary thereto. On the 28th day of May, 1886, at a meeting of the trustees of the village a resolution was adopted, giving permission to Moffett and his associates to form a water works company for the purpose of supplying the village with water, pursuant to the provisions of the act above mentioned, imposing the following condition: "7. The village shall have, at the end of five years and at the end of every five years thereafter, the right to purchase said water works in the manner as now provided for by law." Thereafter, and on the first day of July, 1886, an agreement was entered into by and between the Westchester County Water Works Company, which had theretofore been incorporated, and the village of White Plains, in which the village agreed to take, and the water works company agreed to supply, water for municipal and fire purposes, for a period of five years, at a stipulated price, and then provided: "The party of the second part reserves the right at the expiration of five years from the date of the completion of the works and at the expiration of every five years thereafter, to purchase said works as they may then exist by giving to said company one year's notice of such intention and paying to said company the appraised valuation. The amount so paid to be determined by three persons not in the interest or employ of said village or company, the board of trustees of said village choosing one, the company choosing one, and these two persons choosing a third. Such valuation by said appraisers in no case to exceed the cost of the said works more than ten per cent. And the decision and appraisal of these three persons to be final and conclusive on the parties to this contract." This agreement was renewed on the 23rd day of July, 1892, by a written agreement, containing a number of changes, but omitted the above purchase clause, and then concluded with the provision that "This agreement and the agreement itself (referring to the agreement renewed) shall remain and continue in force for the period of five years from the date of the execution of this agreement."

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The water works company was the owner of four parcels of real estate in the town of White Plains. It had laid water mains from the source of supply to and through the streets of the village, about seventeen miles in length. It had erected standpipes, pumping engines, hydrants, nozzles and other implements of machinery necessary for carrying out its contract with the village. It had given two mortgages upon its property to the Farmers' Loan & Trust Company, upon which two hundred thousand dollars in bonds had been issued, and were outstanding. Its income during the year 1896 was..... \$21,055.38
 Its expenses..... 6,199.35

Its net-earnings..... \$14,856.03

The earnings, therefore, were more than sufficient to pay the interest on the bonded indebtedness. It is claimed that the cost of construction, as shown by the company's books, was \$293,067.03; that no dividends were paid to the stockholders prior to 1894, and that all of the earnings of the company prior to that time had been devoted to the construction and extension of its plant. Its experts testified that the property of the company was worth from three hundred thousand to four hundred thousand dollars. The counsel for the village has vigorously attacked the value of the company's property, and claims that the award made is largely in excess of its true value. He does not, however, question the amount given as the company's income from its business. It is not our province to determine questions of fact. Our jurisdiction is limited to the determination of questions of law. The commissioners of appraisal have, as they state, awarded only nominal damages for the franchises of the company and the good will of its business as a going concern, and it becomes our duty to determine whether the appraisers have adopted an erroneous basis in fixing the amount of their award.

The respondents claim that the result reached by the appraisers is unjust, and that this is practically conceded in their report. The holders of the one hundred thousand dollar bonds of the company, issued upon its second mortgage, have had their securities taken from them and their trustee turned out of court without any remuneration whatever. The stockholders, who for ten years have been constructing a plant and procuring customers for the company, have had their property, franchises and good will taken from them without a penny for themselves or for their creditors. The commissioners of appraisal, recognizing the hardships or injustice resulting from their determination, have said to the bondholders in their report, "that in so far as this decision affected innocent holders of the second mortgage bonds of the Westchester County Water Works Company, we reached it with regret." And to the stockholders they stated that "the suggestion that it seems rather hard on the organizers of this concern that they should not get the full benefit of their activity and enterprise in building up a water business in White Plains, is, to our minds, fully met by the fact that these gentlemen must themselves have contemplated parting with their plant at a price based not upon its value as a going concern, but upon its cost of construction, when they entered into the aforementioned contracts with the village." And, again, "the main reason, the only reason, for the existence of this unfortunate fact is to be found in the inadequacy of the original franchise as restricted by the contracts between the village and the company." The commissioners in giving their reasons for their decision state that "by the contract of July 1st, 1886, the company's franchise was encumbered, having, in our opinion, reduced the value of this franchise to a sum necessarily insignificant as compared with the value which an unrestricted franchise would have had." Again, speaking of the company, they stated, "Did it possess a valuable franchise which could be taken as a basis for the transaction of an unlimited, or even of a limited, but prolonged amount of

future business? Our conclusion was that it did not." It is thus apparent that the question involved in this case depends upon the construction, meaning and effect that is to be given to the purchase clause embraced in the contract, to which we have already referred.

Under the contract the valuation by the appraisers was in no case "to exceed the cost of the said works more than ten per cent." Were the appraisers to determine the value of the property as it then existed? Or were they to determine the cost — the amount expended by the company in the construction of the plant and in the establishment of its business? If the latter, then, as we have seen, the books of the company showed that the cost amounted at that time to nearly \$300,000, and ten per cent added would make nearly \$330,000. But the commissioners of appraisal did not adopt this basis in determining the amount of their award. They found the value of the visible, tangible property of the company as it then existed, excluding the franchise and good will, independent of the question of cost of construction, and made no finding as to the amount of such cost. It is, therefore, apparent that they did not follow the construction of the contract given by themselves in their report, in which they state: "These gentlemen (speaking of the organizers of the company) must themselves have contemplated parting with their plant at a price based *not upon its value* as a going concern, *but upon its cost of construction*, when they entered into the aforementioned contract." We, however, do not deem it advisable to rest our decision upon any construction of the contract which may have been given, for the case involves other questions of paramount importance which we think must control its disposition.

The question raised by the appellants at the threshold of the discussion in this case is to the effect that the purchase clause incorporated in the contract of July 1st, 1886, is *ultra vires* and void; that the village of White Plains had no power to contract for the purchase of the works or to provide for the payment thereof. The statute then in force was chapter 181

of the Laws of 1875, as amended by chapter 175 of the Laws of 1881, chapter 255 of the Laws of 1883, and chapter 211 of the Laws of 1885. That statute authorized any incorporated village in the state to organize a board of water commissioners, and such commissioners were authorized to contract for, purchase and take by deed, in the name of the village, all lands, streams, water, water rights or other property, real or personal, or rights therein, which may be required for the purpose of supplying the village or its inhabitants with pure and wholesome water, and in case the commissioners could not agree with the owners as to the compensation to be paid therefor, they were authorized to institute proceedings for the condemnation of such property rights, and upon their petition the Supreme Court was required to appoint commissioners residing in the county in which the village was located to determine the amount to be paid therefor. These provisions of the statute, however, had reference to lands, streams, water rights, etc., belonging to individuals, and not to the property acquired by water works corporations and already devoted to a public use. The only provision of the statute permitting the acquiring of the property of corporations is section 22, and that provides: "Whenever any corporation shall have been organized under the laws of this state for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the board of water commissioners herein authorized to be created, that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created * * * shall have the right to make application to the Supreme Court, at a special term thereof, held in the judicial district in which the works of such corporation are situated, for the appointment of three commissioners of appraisal, who shall be disinterested freeholders and residents of the county." The other provisions of the statute make it the duty of the commissioners of appraisal to determine the amount that should

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be paid, etc. No authority is, therefore, given to the board of water commissioners to acquire the property of such a corporation by agreement. If it is deemed necessary that the property should be acquired, the board is to apply to the Supreme Court for the appointment of commissioners of appraisal. The statute contains no limitation as to the time within which such application may be made. It may, therefore, be made at any time when the board of water commissioners see fit to act, provided they have complied with the provisions of the act under which they were appointed.

The company's franchise was a perfect grant, permitting it to use the streets of the village for its water mains and giving it the privilege of supplying the municipality and the inhabitants thereof with water. The only restriction was the clause which reserved the right of the village at the end of five years and at the end of every five years thereafter to purchase its works in the manner "as now provided for by law." The right to purchase in the manner provided for by law already existed under the statute, to which we have called attention, and, therefore, this provision in the grant did not add to or take from the grant any right or power whatever, but simply left it subject to the provisions of the existing statute. On the 1st day of July, after the granting of the franchise, the contract in question was entered into to supply the municipality with water for the period of five years. In the first place it reserved the right to the village at the expiration of five years and at the expiration of every five years thereafter to purchase the works of the company as they may then exist by giving to the company one year's notice of such intention and paying the appraised valuation. In the second place the contract proceeds to specify how the valuation shall be made, that is, by three persons, one appointed by the trustees of the village, the other by the company, and the two persons so selected choosing the third. Then follow provisions limiting the valuation not to exceed the cost of the works by ten per cent and making the decision of the appraisers final and conclusive upon the parties.

Under the statute the board of water commissioners had the right to apply to the Supreme Court to condemn the property and to appoint commissioners of appraisal, while under the contract the trustees of the village substituted an entirely different proceeding for the acquiring of the property. The statute, as we have seen, has not authorized the trustees of the village to acquire such property; that power the legislature has given to the board of water commissioners. Such board only has the power to act for the village and make valid contracts with reference to the acquiring of property for water works; the board of trustees of the village had no power to carry out the provisions of the contract and complete the purchase of the property thereunder, even though the water works company should consent thereto. They could not issue bonds, borrow money, or pay therefor and make their acts binding upon the municipality, for the reason that the statute had given them no such powers.

The functions of municipalities, such as cities and villages, are chiefly public, but some may be private. The general powers of government are public. They pertain to the powers of legislation, the adoption of ordinances, the protection of property, the care of highways, and the raising of taxes for the support of the government. In addition to these powers other functions are at times conferred upon municipal corporations, by which they may act in their individual capacity for their own private gain. Dillon, in his work on Municipal Corporations (Vol. 1, sec. 27), says: "Powers or franchises of an exceptional and extraordinary nature may be, and sometimes are, conferred upon municipalities such as are frequently conferred upon individuals or private corporations; thus, for example, a city may be expressly authorized, in its discretion, to erect a public wharf and charge tolls for its use; or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense they may be considered private because they are such as may be, and often are, conferred

upon individuals and private corporations and result in a special advantage or benefit to the municipality as distinct from the public at large." At common law it was no part of the duty of municipalities to furnish light or water for their inhabitants, any more than it was their duty to supply any of the other necessities or conveniences. The supplying of gas and water by the municipality necessitates its engaging in business of a private character which competes with individual effort and enterprise. When, therefore, a city or village wishes to engage in such business, it must first obtain special legislative authority therefor.

In the case of *Wells v. Town of Salina* (119 N. Y. 280) EARL, J., in delivering the opinion of the court, says: "Business corporations, unless restrained by their charters, possess the power to borrow money and issue securities therefor. * * * But towns and other municipal corporations are organized for governmental purposes, and their powers are limited and defined by the statutes under which they are constituted. They possess only such powers as are expressly conferred or necessarily implied. They are clothed with the power of taxation, and can thus raise all the money needed for ordinary municipal purposes. * * * It is the general, if not the universal, law of this country, and of England, that municipalities are not empowered to borrow money for municipal purposes unless expressly authorized to do so by statute." In the case of *Smith v. City of Newburgh* (77 N. Y. 130) the action was to recover \$750 for rent upon a lease of land made by the plaintiff to the city of Newburgh. The lease was made by the city upon recommendation of water commissioners, for the purpose of constructing thereupon a distributing reservoir. The lease ran for the term of twenty years. It was held that the city had no power to enter into such a contract, and that, therefore, the lease was void; that where the officers of a municipality fail to pursue the strict requirement of a statutory enactment in contracting for the municipality, it is not bound, nor is it bound by any acts of its officers, in ratification of such illegal contract. In the case

of *Syracuse Water Company v. City of Syracuse* (116 N. Y. 167) the question involved was as to whether the grant of a franchise to the water company was to be deemed the grant of an exclusive privilege to occupy the streets of the city with its pipes. It was held that the grants of franchises by the state are to be so strictly construed as to operate as a surrender of the sovereignty no further than is expressly declared by the terms of the grant; the grantee takes nothing in that respect by inference. BRADLEY, J., in delivering the opinion of the court, says: "The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant exclusive privileges, especially to put mains, pipes and hydrants in its streets, nor could it lawfully, by contract, deny to itself the right to exercise the legislative powers vested in its common council." In *Huron Water Works Company v. City of Huron* (30 L. R. A. 848) it was held that the power to construct a water works system for a city is not a necessary incident of its corporation, but must, like all its other powers, be derived directly from the legislature of the state. (See, also, *City of Petersburg v. Applegarth*, 28 Gratt. 321; 28 Am. Rep. 357, and *Matter of Long Island Water Supply Co.*, 30 Abb. [N. C.] 36-44.) It, consequently, follows that the trustees of the village of White Plains had no power to make the contract in question, or to carry out its provisions; that it is not a contract which could be enforced by or against them, and it is, therefore, *ultra vires* and void. These proceedings were, as we have seen, instituted by the board of water commissioners, pursuant to the provisions of the statute to which we have called attention. Under the provisions of this legislation it became the duty of the commissioners of appraisal to appraise the value of the company's property, including its good will and franchise at its full value but without enhancement from any of the provisions of the act. The commissioners of appraisal, instead of following these provisions of the act, have, as we have seen from their report, refused to be governed thereby and have instead thereof attempted to follow the provisions

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Statement of case.

of the contract. In doing this they adopted a wrong basis for the ascertainment of the value of the company's property.

The order of the Appellate Division and that of the Special Term confirming the report of the appraisers should be reversed and the report of the commissioners set aside and a new appraisal ordered before new commissioners to be appointed by the court, with costs to abide the final award of costs.

PARKER, Ch. J., VANN and WERNER, JJ., CONCUR: GRAY and MARTIN, JJ., absent; CULLEN, J., dissents.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JESSE LEWISOHN, Respondent, v. WILLIAM J. O'BRIEN, as Sheriff of New York County, et al., Appellants.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JESSE LEWISOHN, Respondent, v. WILLIAM E. WYATT, as Justice of the Court of Special Sessions of the City of New York, Appellant.

1. CONSTITUTIONAL LAW—WITNESS IN ANY CRIMINAL CASE NOT COMPELLED TO GIVE ANY EVIDENCE AGAINST HIMSELF—WHEN DETERMINATION WHETHER OR NOT ANSWER WILL INCRIMINATE HIM RESTS WITH WITNESS—CONST. ART. 1, SEC. 6. Under section six of article one of the State Constitution, providing that no person "shall be compelled in any criminal case to be a witness against himself," he is not obliged to answer questions in any criminal case, either against himself or another party, when he states that his answers might tend to incriminate him; he is protected from being compelled to disclose the circumstances of his offense or the sources from which, or the means by which, evidence of its commission, or his connection with it, may be obtained or made effectual for his conviction, without using his answers as direct admissions against him; and except where the court can see that his refusal to answer is clearly a fraudulent device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, he is his own judge as to whether or not he will answer.

2. PRIVILEGE OF WITNESS PROVIDED FOR BY SECTION 842 OF THE PENAL CODE NOT COEXTENSIVE WITH THAT AFFORDED BY CONSTITUTIONAL PROVISION. Section 842 of the Penal Code, providing that "No

person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding," is not coextensive with the constitutional provision and does not afford the witness the protection contemplated thereby, in that it does not prevent the use of evidence against him which may be obtained through his testimony, but simply excludes such testimony.

3. SAME. A witness produced by the prosecution before a magistrate on an information charging the defendant with keeping a gambling house may properly refuse to answer questions as to whether he had ever been in the place in question, upon the ground that his answers might tend to incriminate him, since the statute does not afford him the full protection accorded by the constitutional provision.

People ex rel. Lewisohn v. O'Brien, 81 App. Div. 51, affirmed.

(Argued June 4, 1903; decided October 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 10, 1903, which reversed an order of Special Term denying the relator's petition that he be discharged from arrest on writs of habeas corpus and certiorari and remanding him to custody, and sustained such writs and directed that the relator be discharged.

The facts, so far as material, are stated in the opinion.

William Travers Jerome, District Attorney (*Howard S. Gans* of counsel), for appellants. Prior to the decision of this case in the court below it was settled beyond question in this state that a witness might be compelled to testify to incriminatory matter if he were guaranteed by statute that his answers could not be introduced in evidence against him in a subsequent criminal case. (*People ex rel. v. Kelly*, 24 N. Y. 74; *Lathrop v. Clapp*, 40 N. Y. 328; *People v. Sharp*, 107 N. Y. 427; *Gilpin v. Daly*, 59 Hun, 413; *Perrine v. Striker*, 7 Paige, 598; *People ex rel. v. Hyatt*, 172 N. Y. 198; *C. C. T. Co. v. K. R. R. Co.*, 154 N. Y. 495.) The decision in the *Hackley* case is sound in principle and the decisions *contra* in other jurisdictions proceed upon a mistaken theory of the history and of the purpose of the constitutional provision,

that "no person shall be compelled in any criminal case to be a witness against himself." (*Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591; *People v. Sharp*, 107 N. Y. 427; *People v. Gardner*, 144 N. Y. 119; *Matter of Davies*, 168 N. Y. 89.) The theory in *Counselman v. Hitchcock* has been discredited by the Supreme Court of the United States, and is contrary to the general body of legal reasoning upon the subject. (*Brown v. Walker*, 161 N. Y. 596; *Duffy v. People*, 26 N. Y. 588; *Matter of Tucker*, 5 City H. Rec. 164; *Matter of Jackson*, 1 City H. Rec. 28; *Matter of Stage*, 5 City H. Rec. 177; *Brester v. State*, 26 Ala. 107; *Murphy v. State*, 63 Ala. 1; *Bank v. State*, 84 Ala. 430; *Jones v. State*, 75 Ga. 825; *State v. Mortimer*, 20 Kan. 93.) It is established by the contemporaneous construction of the constitutional provision in question that a statute such as section 342 of the Penal Code was not considered obnoxious to its terms. (*Perrine v. Striker*, 7 Paige, 593.) The decision of the court below is subversive of the policy of this state, as evidenced by the continuous course of legislation for the past ninety years, and creates an obstacle to the orderly administration of justice which will inevitably lead to lawlessness and oppressive official action. (*People ex rel. v. Taylor*, 143 N. Y. 219.) The relator is not relieved from the obligation to answer by reason of the fact that his answer might tend to subject him to a penalty, since his testimony is by statute rendered unavailable for that purpose as well as for the purpose of criminal prosecution in its ordinary sense. (*Perrine v. Striker*, 7 Paige, 598; *Brown v. Walker*, 161 U. S. 598.)

Alfred Lauterbach and *P. J. Rooney* for respondent. The early rule in this state adopting a rigid and narrow construction of section 6 of article 1 of the Constitution is no longer in force. (*Counselman v. Hitchcock*, 142 U. S. 547; *People ex rel. v. Forbes*, 143 N. Y. 219; *Matter of Peck v. Cargill*, 167 N. Y. 391; *Kellogg v. Sowerby*, 32 Misc. Rep. 327; *Matter of Leich*, 31 Misc. Rep. 671;

People v. Lewis, 14 Misc. Rep. 264; *Matter of Attorney-General*, 21 Misc. Rep. 101; *People ex rel. v. Nussbaum*, 55 App. Div. 245; *Lamson v. Boyden*, 160 Ill. 613; *Miskimins v. Shaver*, 58 Pac. Rep. 411.) The decision in the *Kelly* case is unsound in principle and proceeds upon a mistaken theory of the history and purpose of the constitutional provision. (*Collier v. Collier*, 4 Leonard, 194; *Emery's Case*, 107 Mass. 172; *Burroughs v. High Com.*, 3 Bulst. 48.) The decision of the United States Supreme Court in the case of *Counselman v. Hitchcock* has been expressly approved in all of the subsequent decisions of that court, and has been followed in most of the states of the Union, even though in many of the states it became necessary to overrule former decisions of their courts upon the same subject. (*Brown v. Walker*, 161 U. S. 591; *People v. Gardner*, 144 N. Y. 119; *Boyd v. U. S.*, 116 U. S. 616; *Wilson v. State*, 51 S. W. Rep. 916; *Ex parte Wilson*, 39 Tex. Cr. Rep. 630; *Matter of P. R. Com.*, 32 Fed. Rep. 250; *Matter of Comingore*, 96 Fed. Rep. 562; *United States v. N. Lead Co.*, 75 Fed. Rep. 94; *United States v. Bell*, 81 Fed. Rep. 836; *Ryder v. Bateman*, 93 Fed. Rep. 33; *United States v. Wong Quong Wong*, 94 Fed. Rep. 833.) The constitutionality of section 342 of the Penal Code cannot be established upon the principle of contemporaneous construction. (*Newell v. People*, 7 N. Y. 9; *People v. Allen*, 42 N. Y. 378-384; *Oakley v. Aspinwall*, 3 N. Y. 568; Story on Const. § 407; Cooley on Const. Lim. [6th ed.] 84; *People v. N. Y. C. R. R. Co.*, 24 N. Y. 485; *Boyd v. U. S.*, 116 U. S. 616; *People ex rel. v. Forbes*, 143 N. Y. 219; *Matter of Peck v. Cargill*, 167 N. Y. 391; *Perrine v. Striker*, 7 Paige, 598.) The decision of the court below is in accord with the public policy of our institutions and form of government. (*People v. Allen*, 42 N. Y. 378; *Oakley v. Aspinwall*, 3 N. Y. 547; *State v. S. H. Co.*, 109 Mo. 118.) The relator was justified in declining to answer the questions asked on the ground that his answers to the same might expose him to a penalty or forfeiture. (2 Philips on Ev. 936; 1 Greenl. on Ev. § 453;

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2 Taylor on Ev. § 1453; Chase's Stephen's Digest of the Law of Evidence [2d ed.], 294; 29 Am. & Eng. Ency. of Law, 836; *Johnson v. Donaldson*, 18 Blatchf. 288; *Huntington v. Attrill*, 146 U. S. 657; *Bones v. Booth*, 2 W. Bl. 1226; *Brandon v. Pate*, 2 H. Bl. 308; *Read v. Stewart*, 129 Mass. 407; *Cole v. Groves*, 134 Mass. 471; *Rogers v. Decker*, 131 N. Y. 490; *Henry v. Salina Bank*, 1 N. Y. 83; *Livingston v. Tompkins*, 4 Johns. Ch. 431; *Livingston v. Harris*, 3 Paige, 533.)

BARTLETT, J. In December, 1902, an information was presented to the Court of Special Sessions of the First Division of the city of New York, charging in due form that for the period beginning the first day of January, 1902, and ending the first day of December, 1902, one Richard A. Canfield was conducting a gambling house at No. 5 East 44th street, in the city of New York, and praying that subpoenas might issue in order that the matter be fully inquired into upon oaths of persons attending in obedience to such subpoenas.

Thereafter, at the request of the district attorney, the magistrate issued a subpoena addressed to the relator herein, requiring him to attend before him and to answer such questions as might be put to him on the information against Canfield. The relator appeared and was duly affirmed, pursuant to law, and after stating upon examination that he had known the defendant Richard A. Canfield four or five years and that he had not been in the premises No. 5 East 44th street prior to December, 1899, was asked the following questions: "Q. Have you ever been in there in your life? Have you ever been in the premises No. 5 East 44th Street, in the City and County of New York?" These questions the relator refused to answer on the ground, among others, that they might tend to criminate him.

The district attorney thereupon promised the witness immunity, and called his attention to section 342 of the Penal Code as affording him complete protection. The court there-

upon directed the witness to answer, and the latter said, "I respectfully decline, judge." Thereupon a complaint was made by a deputy assistant district attorney, duly setting forth the facts, and thereon and on certain exhibits annexed, the magistrate issued a warrant for the arrest of the relator, charging him with a criminal contempt of court. The warrant was thereupon delivered to the appellant Gannon, a peace officer, who arrested the relator.

After various proceedings unnecessary at this time to consider in detail, Gannon, the peace officer, was served with a writ of habeas corpus, commanding him to bring the relator before Justice SCOTT of the Supreme Court, and a writ of certiorari was also obtained directed to Justice WYATT of the Special Sessions. Upon the hearing of the issues an order was made dismissing the writs and remanding the relator to the custody from which he was taken. Upon appeal the Appellate Division reversed this order with a divided court.

The relator seeks to justify his refusal to answer under article one, section six, of the Constitution of this state, which provides that no person "shall be compelled, in any criminal case, to be a witness against himself."

It is insisted on behalf of the People that the witness is fully protected by section 342 of the Penal Code, and should have been compelled to answer. The section reads as follows: "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding."

The relator contends that this section does not afford him full protection, and is not as broad in its provisions as the Constitution. This constitutional provision is precisely the same in phraseology as the fifth amendment of the Constitution of the United States. The same language is also found, in substance, in many of the State Constitutions.

Early in the history of this court, in *People ex rel. Hackley v. Kelly* (24 N. Y. 74), this provision of the State Constitution

was construed, the court holding that it did not protect a witness in a criminal prosecution against another person from being compelled to give testimony which implicates him in a crime, when he has been protected by statute against the use of such testimony on his own trial. Judge DENIO said (pp. 82, 83): "It is perfectly well settled that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer. (*People v. Mather*, 4 Wend. 229, and cases there referred to.) This course of adjudication does not result from any judicial construction of the constitution, but is a branch of the common-law doctrine which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is of course competent for the legislature to change any doctrine of the common law, but, I think, they could not compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because, I think, as has been mentioned, that, by legal construction, the constitution would be found to forbid it. But it is proposed by the appellant's counsel to push the construction of the constitution a step further. A person is not only compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person, where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured from his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the constitution is so sedulous to

screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law."

We thus have a clear interpretation of the constitutional provision which reads that "no person can be compelled, in any criminal case, to be a witness against himself," as follows: That the words "any criminal case" mean a criminal case against the witness; that the prohibition, "no person can be compelled * * * to be a witness against himself," is fully satisfied when the evidence of a witness taken on the trial of another person is held to be inadmissible on his own criminal prosecution; the fact that his evidence on the trial of another person may afford the public prosecutor some facilities for fastening the guilt upon himself does not permit him to be silent.

It is clear, if this case is to be regarded as containing a correct exposition of the constitutional provision under review, that the relator should have been required to answer the questions propounded to him, as his protection, alike under the Constitution and the statute, is confined to the single provision that his evidence cannot be received against him in any criminal investigation or proceeding.

The opinion in *People ex rel. Hackley v. Kelly* (*supra*) was written by a distinguished jurist, whose learning and ability have placed him among the great judges of this state who now rest from their labors.

It is with no little hesitation that this court feels constrained to adopt a less technical and more liberal interpretation of this brief provision of the Constitution.

As we have already pointed out, the fifth amendment to the Constitution of the United States contains the precise language of our State Constitution now under review.

In *Brown v. Walker* (161 U. S. 591, 606) the Supreme Court of the United States said:

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"It is true that the Fifth Amendment to the Constitution of the United States does not operate upon a witness testifying in the state courts, as the first eight amendments to the Constitution of the United States are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several states, except so far as the Fourteenth Amendment may have made them applicable. (*Barron v. Baltimore*, 7 Peters, 243; *Fox v. Ohio*, 5 How. [U. S.] 410; *Withers v. Buckley*, 20 How. [U. S.] 84; *Twitchell v. Commonwealth*, 7 Wall. 321; *Presser v. Illinois*, 116 U. S. 252.)"

It, therefore, follows that while the case to which we are about to refer, of *Counselman v. Hitchcock* (142 U. S. 547), may not be binding as an authority upon this court, yet its reasoning is most persuasive and has been followed in several states of the Union whose Constitutions contain a similar provision to the one under consideration. (*Smith v. Smith*, 116 N. C. 386; *Ex parte Cohen*, 104 Cal. 524; *Ex parte Arnot Carter*, 166 Mo. 604; *Miskimins v. Shaver*, 58 Pac. Repr. [Wyo.] 411. See, also, *Emery's Case*, 107 Mass. 172.)

In *Counselman v. Hitchcock* (*supra*) it was held that where a person was under examination before a grand jury, in an investigation into certain alleged violations of the Interstate Commerce Act, he is not obliged to answer questions where he states that his answers might tend to criminate him, although section 860 of the United States Revised Statutes provides that no evidence given by him shall be in any manner used against him, in any court of the United States, in any criminal proceeding. The case before the grand jury was a criminal case. The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.

Mr. Justice BLATCHFORD, writing for the court, said (p. 562): "It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence except in a criminal case against himself, but such is not the language of the Constitution. Its provision is that no person shall be compelled *in any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal proceeding against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

At page 564 the learned judge continues: "It remains to consider whether section 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him

or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture. It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture. This, of course, protected himself against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer he could not possibly have been convicted."

The court thereupon held that section 860 of the United States Revised Statutes is not co-extensive with the constitutional provision, and that it was a reasonable construction of the provision that the witness is protected from being compelled to disclose the circumstances of his offense or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction without using his answers as direct admissions against him.

Judge BLATCHFORD stated that the court could not yield assent to the views expressed by the Court of Appeals of New York in *People ex rel. Hackley v. Kelly* (*supra*).

We are of opinion that the construction given to the very clear and plain words of the Constitution in *Counselman v. Hitchcock* is reasonable, fair and accords a witness only such protection as the plain letter of the Constitution confers.

If this is not the proper construction the witness might be

required to disclose circumstances that would enable the public prosecutor to institute criminal proceedings against him wherein he might be convicted without reading his evidence taken in another case.

The language of Chief Justice MARSHALL in the Circuit Court of the United States for the District of Virginia (June, 1807), in *Burr's Trial* (1 Burr's Trial, 244), on the question whether the witness was privileged not to accuse himself, is as follows: "If the question be of such a description that an answer to it may or may not criminate the witness according to the purport of that answer it must rest with himself, who alone can tell what it should be, to answer the question or not. If in such a case he may say upon his oath that his answer would criminate himself the court can demand no testimony of the fact. * * * According to their statement (the counsel for the United States) a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a wit-

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ness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

A clearer and more cogent statement of the rule it would be difficult to find.

It is insisted by the counsel for the respondent that *People ex rel. Hackley v. Kelly* was overruled in *People ex rel. Taylor v. Forbes* (143 N. Y. 219). In that case there was no statute protecting the witness in the use of his testimony, and he having refused to answer, on the ground that to do so would tend to criminate him, this court held that the witness was in such a case the judge of the effect of answers sought to be drawn from him, and that nothing short of absolute immunity from prosecution could take the place of the constitutional privilege.

It is true that there are many expressions in the opinion of the court indicating its tendency to depart from the strict rule laid down in *People ex rel. Hackley v. Kelly*, but the case is not precisely in point.

The respondent also cites *Matter of Peck v. Cargill* (167 N. Y. 391) as sustaining his contention that *People ex rel. Hackley v. Kelly* can be no longer regarded as authority.

It is sufficient to say of the case cited that the point now under consideration was not directly presented, but in the opinion *Counselman v. Hitchcock* is cited with approval as sustaining the failure of the holder of a liquor tax certificate to file a verified answer in proceedings under the Liquor Tax Law.

It is true in this case, as in the one last cited, that the general language of the opinion indicates the tendency of the court to depart from the rule laid down in *People ex rel. Hackley v. Kelly*.

The learned assistant district attorney insists that while the case of *Counselman v. Hitchcock* has never been actually overruled, the court has refused to extend the principle, and has repudiated entirely the reasoning on which it was founded. In support of this contention *Brown v. Walker* (161 U. S.

591) is cited. That case involved the construction of the act of 1893 in reference to producing books, papers, etc., before the interstate commerce commission. The court pointed out that this act was passed in view of the opinion of the court in *Counselman v. Hitchcock*, to the effect that section 860 of the United States Revised Statutes was not co-extensive with the constitutional provision. The court held in substance that the statute of 1893 was co-extensive with the Constitution in the immunity that it offered the witness, and that he was deprived of his constitutional right thereby and must answer the question.

The statement by way of criticism of *Counselman v. Hitchcock* is as follows (p. 600): "The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

It is doubtless true that cases may arise where the mere fact of the witness asserting that to answer the question would tend to criminate him would not be conclusive. Where the court can see that the refusal to answer is a mere device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, an answer may be insisted upon.

The decision in *Brown v. Walker (supra)* in no way militates against the construction of the Constitution in *Counselman v. Hitchcock*. It merely argues that the rule might be used for improper purposes and to shield the guilty. Any general rule is subject to abuse, and the court will be always vigilant to see that it is not employed in the interests of fraud and to secure a failure of justice. It is clear

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that in *Counselman v. Hitchcock* the rule was properly applied, and we accord to that decision our full approval.

This distinction is to be kept in mind as to the attitude of a witness before the court where complete statutory protection, co-extensive with the constitutional provision, exists, and where it is lacking.

In the former situation the witness is deprived of his constitutional right of refusing to answer.

The point was decided by this court in *People v. Sharp* (107 N. Y. 427), and by the Supreme Court of the United States in *Brown v. Walker* (161 U. S. 591). We adhere to the point thus decided.

In the latter situation, where statutory immunity does not exist, which was dealt with by Chief Justice MARSHALL in language already quoted (1 Burr's Trial, 244), it rests with the witness whether he will answer or not, except, as we have pointed out, where the refusal is clearly a fraudulent device to protect a third party.

In thus extending the rule, as hitherto laid down by this court, we are persuaded that the complete immunity sought to be afforded the citizen by the Constitution from being a witness against himself in any criminal case is fully secured. The evolution of this right has been slow, indeed, since the days of the Star Chamber in England, when defendants, on a refusal to be sworn against themselves, were whipped at the cart's tail and pilloried; had ears cut off and noses slit; were fined enormous sums and imprisoned for years.

The methods of the seventeenth century were long since abandoned, but the desire to elicit from a suspected or accused person evidence that would send him to the cell or the scaffold unfortunately survives, and this court has, in recent years, been called upon to condemn on several occasions modes of procedure having that end in view.

In the case at bar, in view of the principles of law discussed, the relator was justified in refusing to answer the questions propounded to him, on the ground that the answers would tend to criminate him.

It is quite impossible for the court to say to what extent the witness, if he answered, would be criminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture; he might be tried and convicted as a common gambler, which is declared by statute to be a felony. All this might be accomplished without using his evidence against him, if given herein.

We assume, as did the Appellate Division, that it is not contended by the prosecution that the questions which the relator refused to answer were preliminary in character, but rather that it is conceded by both parties that they are so framed as to call for a decision on the merits.

The order appealed from should be affirmed, with costs, the writs sustained and the relator discharged.

GRAY, J. What hesitation I have, in agreeing to an affirmation, is because the effect of our decision will be to change a rule of construction, which was early laid down in this state in *People ex rel. Hackley v. Kelly*, and to overrule the authority of that case. I find no decision of this court which has gone that far. But the rule of that case, being one of evidence, or of procedure, may be changed, and should be changed, if not consistent with the enjoyment of the full measure of the citizen's constitutional rights. It is my judgment that the reasoning of the opinion of the United States Supreme Court in *Counselman v. Hitchcock* is more convincing, in giving a construction to the language of the constitutional clause, than is that of this court, as expressed in its opinion in the *Hackley* case. I, therefore, am willing to place this court in accord with the later expressed views of the federal tribunal. I think that the words "in any criminal case," which are used in the constitutional clause, are entitled, when we consider the moving principle for its incorporation into the fundamental law of the state, to a broader construction than was accorded to them in the *Hackley* case.

If the interests of the People are deemed to require it, it is, of course, quite competent, and proper, for the legislative

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body to provide for an exemption of the witness from liability to prosecution, as broad in its effect as is the constitutional privilege.

PARKER, CH. J., O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. (and GRAY, J., in memorandum), concur with BARTLETT, J.
Order affirmed.

THE CITY OF NEW YORK, Respondent, v. WILLIAM P. BAIRD
et al., Appellants.

PRINCIPAL AND SURETY—IMPAIRMENT OF INDEMNITORS' RIGHTS—QUESTION OF FACT. In an action upon a bond given to the city of New York as a substitute for moneys retained by the comptroller under a contract for laying water mains, to meet claims for damages which might arise from the negligence of the contractor, it appeared that a judgment based upon his negligence had been obtained against the city and the contractor; that both appealed; that thereafter the city, against his protest, settled by paying less than the amount of the judgment, but left it intact as to him, of all of which the surety had no notice, nor was it given an opportunity to say whether it would further indemnify the city on the condition that it would either prosecute the appeal or permit the surety to do so; that the reason given for the city's action was that while counsel believed there might be a reversal, he believed there would be another recovery in as great if not greater amount, and he deemed it wise to secure a reduction as the bond secured less than half of the amount of the judgment. It also appeared that after the settlement the city brought an action on a bond executed by the contractor at the time of the contract and conditioned for its faithful performance in which it sought to recover the full amount paid in settlement of the judgment, which action was still pending. *Held*, that it was a question of fact, 1, whether or not the settlement was made in bad faith. 2. If so made, did it operate to the injury of the principal and surety? If made in bad faith with the intention of injuring the principal and surety, the plaintiff cannot recover unless it shows that its action did not operate to the disadvantage of either, or if it did to some extent, that, after deducting the amount of damage done to them, there still remained something due on the bond. A judgment of the Appellate Division, therefore, which reverses an order setting aside a verdict directed in plaintiff's favor and restores the original judgment entered thereon must be reversed and a new trial granted in order that the defendants may have an opportunity of presenting these questions to a jury.

City of New York v. Baird, 74 App. Div. 238, reversed.

(Argued June 18, 1903; decided October 20, 1903.)

APPEAL from a judgment, entered August 5, 1902, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial, and directed judgment for plaintiff upon the verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Woolsey Shepard and *Joseph McElroy, Jr.*, for appellants. The stipulation to pay and satisfy any judgment contained in the condition of the bond of indemnity means (1) a valid judgment and (2) a final judgment in the Court of Appeals, and is not restricted to a judgment of the trial court. (*Wheeler v. Sweet*, 137 N. Y. 435; *Foo Long v. A. S. Co.*, 146 N. Y. 251; *Aeschlimann v. Presbyterian Hospital*, 165 N. Y. 296; *Kirby v. D. & H. C. Co.*, 90 Hun, 588; *Roberts v. Johnson*, 58 N. Y. 613; *Kane v. Smith*, 80 N. Y. 458; *Beal v. Finch*, 11 N. Y. 128; *Robinson v. Plimpton*, 25 N. Y. 484; *Travers v. Nichols*, 7 Wend. 434.) The right of appeal is a constitutional right which cannot be waived except by express stipulation and in unambiguous terms. The stipulation in the condition of the bond given by Baird and the surety company contains no such waiver and its terms cannot be so construed. (*Stedeker v. Bernard*, 93 N. Y. 589.) If there was a breach in the condition of the bond immediately upon the entry of the Kelly judgment, and an accrual of liability in favor of respondent against appellants, the breach was waived by the taking of an appeal by respondent and the liability of appellants was postponed and the contract of indemnity modified to such extent until the determination of said appeal. (*Toplitz v. Bauer*, 161 N. Y. 325; *Thompson v. Poor*, 147 N. Y. 402; *Gray v. Green*, 9 Hun, 334; *Dodge v. Zimmer*, 110 N. Y. 43; *Nicoll v. Sands*, 131 N. Y. 19; *Woolsey v. Funke*, 121 N. Y. 87; *Sattler v. Hallock*, 160 N. Y. 291; *G. F. P. C. Co. v. T. Ins. Co.*, 162 N. Y. 399.) The intention of Baird and the surety company, when the

bond was given, determines the extent of their obligation and is to be ascertained from the meaning of the language used in the bond itself, read in the light of the circumstances surrounding its execution. (*U. C. S. Inst. v. Young*, 161 N. Y. 23; *Nat. M. B. Assn. v. Conkling*, 90 N. Y. 116; *Smith v. Molleson*, 148 N. Y. 241; *Tilden v. Tilden*, 8 App. Div. 99; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *White's Bank v. Myles*, 73 N. Y. 336; *French v. Carhart*, 1 N. Y. 102; *Coleman v. Beach*, 97 N. Y. 545; *Bennett v. Edison*, 26 App. Div. 363; *Blossom v. Griffin*, 13 N. Y. 569.) The contract of Baird and the surety company with the city of New York, as embodied in the bond, is one of suretyship, and is to be interpreted by the ordinary rules of construction governing such contracts, namely, strictly in accordance with its terms. The compromise of the Kelly judgment by the city, without notice to the surety company, and against the protest of the defendant Baird, so altered and changed their position and so affected and prejudiced their legal rights and status as to constitute a breach of the contract on the part of the city of New York and to release the surety company and Baird from their liability on the bond. (*Page v. Kreky*, 137 N. Y. 307; *Smith v. Molleson*, 148 N. Y. 241; *Phelps v. Borland*, 103 N. Y. 406; *J. C. Bank v. Streader*, 106 N. Y. 186; *Lynch v. Reynolds*, 16 Johns. 41; *Brown v. Williams*, 4 Wend. 360; *Wheeler v. Sweet*, 137 N. Y. 435; *Acer v. Hotchkiss*, 97 N. Y. 396; *Foo Long v. A. S. Co.*, 146 N. Y. 254; *Ballman v. A. S. Co.*, 104 Fed. Repr. 634.) Respondent was entitled on the trial to have the question submitted to the jury, whether the settlement and compromise made by the city was made in good faith and whether same was not a constructive fraud on the rights of respondent. (*Foo Long v. A. S. Co.*, 146 N. Y. 251; *Wheeler v. Sweet*, 137 N. Y. 435; *A. S. Co. v. Ballman*, 104 Fed. Repr. 634; *Easton v. Lyman*, 26 Wis. 61; *Stark v. Fuller*, 42 Penn. St. 320; *Knapp v. Smith*, 27 N. Y. 277; *Wakeman v. Daily*, 44 Barb. 498; 51 N. Y. 27; *Aeschlimann v. Presby. Hospital*, 165 N. Y. 296.)

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Terence Farley* of counsel), for respondent. By the express terms of the bond the defendants were in default upon the entry of the judgment obtained by Thomas Kelly against the plaintiff. It makes no difference, therefore, so far as their liability is concerned, whether or not the plaintiff appealed or settled said judgment without their consent. (*Conner v. Reeves*, 103 N. Y. 527; *M. S. Bank v. Thomson*, 58 Minn. 346; *Brown & Haywood Co. v. Legon*, 92 Fed. Repr. 851; *Challoner v. Walker*, 1 Burr. 574; *Sparkes v. Martindale*, 8 East, 593; *Hancock v. Clay*, 2 Stark. 100; *Wheeler v. Sweet*, 137 N. Y. 435; *Given v. Driggs*, 1 Caines, 450; *Lee v. Clark*, 1 Hill, 56; *Creamer v. Stephenson*, 15 Md. 211.) The fact that there is an indemnity bond attached to the contract does not affect the question of the liability of the defendants. (*A. S. Co. v. Thurber*, 121 N. Y. 655; *Sachs v. Am. Surety Co.*, 72 App. Div. 60; *U. C. S. Inst. v. Young*, 161 N. Y. 23.)

PARKER, Ch. J. The recovery is on a bond given by defendants as principal and surety conditioned for the payment and satisfaction of any judgment which may be obtained in an action brought by one Kelly against the city of New York.

Defendants insist that the recovery ought not to stand because (1) as to defendant Baird the city, without right, made a settlement with Kelly and caused the judgment to be satisfied as to it against the protest of Baird, who insisted that an appeal taken by the city and himself was well taken, and should be prosecuted to the end; and (2) as to the surety company, that it was entitled to notice of the settlement and the consequent opportunity to take the city's place and prosecute the appeal.

The execution and delivery of the bond upon which this action is founded was induced by these circumstances: Baird had a contract with the city of New York for laying water mains, one of the provisions of which was that he would indemnify and save harmless the city of New York against

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and from all suits and actions and all costs and damages to which the city might be put for, or on account of any injury, or alleged injury, to the person or property of another resulting from negligence in the performance of the work or in guarding the same. During the progress of the work Kelly, a member of the fire department, drove his engine into some part of the excavation. It was in the night time and he claimed there were no lights to warn him of the danger. His injuries were very serious and very promptly he commenced an action against the contractor, Baird, and the city of New York, the liability of the latter resting upon its duty to keep the public highway in a safe condition for travel while the work was in progress, and its failure to guard the street and ditch. (*Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1.) Before that action came on for trial Baird, having completed his contract, sought to obtain from the comptroller the balance of the contract price, which exceeded the sum of \$25,000. But the comptroller claiming, as he lawfully might, that the provisions in the contract to which brief reference has been made enured to the benefit of the city, and entitled it to retain sufficient of the moneys due the contractor to indemnify it against any claim made against it by reason of the contractor's negligence (*Mansfield v. Mayor, etc., of N. Y.*, 165 N. Y. 208), refused to pay over such balance. Negotiations on this subject resulted in a consent by the municipal authorities to accept a bond with a surety company as surety for \$10,000 conditioned, as has already been noted, for the payment of any judgment to be obtained in the action, upon the giving of which the municipal authorities paid over the \$25,000 to Baird.

The trial of Kelly's action, however, disclosed that the jury took a very different view of the extent of the injuries received by Kelly from that taken by Baird and the representatives of the municipality, for their verdict exceeded \$22,000.

After the entry of judgment an appeal was taken by Baird and the city. Some months later, and while the appeals were pending undisposed of, the city made a settlement with Kelly by which it secured a reduction of the judgment as against it

by something more than \$5,000. The city having paid \$7,500 in excess of the amount secured by the bond then brought this action.

Baird and his surety insist that the city having taken an appeal was bound to prosecute it to the end, although the result to the city might be a very substantial loss, while the view of the city authorities seems to be that the city owed no duty whatever either to the principal or his surety in the bond and, therefore, could accept as final any judgment rendered in that action no matter how excessive the damages or how many the substantial errors of law committed by the trial court. But the view-point of each is partial and quite too narrow we think, and for that reason, doubtless, is unsupported by authority.

In *Conner v. Reeves* (103 N. Y. 527) the question was neither presented by the record nor discussed by the counsel or the court whether an indemnity can be availed of by one depriving the indemnitor of such rights of appeal as the statute undertakes to secure to all litigants. Nor was such a question presented in *Wheeler v. Sweet* (137 N. Y. 435), although a very interesting question was decided, namely, that while a judgment against a sheriff obtained in due course ordinarily fixes the liability of the indemnitors, although not parties and without notice of the action, at the same time good faith requires the sheriff, if requested, to give the indemnitors an opportunity to present a defense, and if this is refused, or prevented by his act, he may not say that the indemnitors have not been injured or that the judgment determines their liability. The proposition decided was no more to be found in that bond than in this one, but it was read into it by the court, and furnished a precedent of which many more could be found for a like reading in this case if justice will be thereby promoted.

The excuse offered by the city authorities for changing their position after taking an appeal is that Kelly's counsel came to them with an offer of compromise, and while the learned assistant corporation counsel was of the opinion that a

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reversal would quite likely result from the appeal, his view was that the reversal would be on technical grounds which would not at all stand in the way of a submission of the case to a jury on a new trial, and it was his judgment that as large and possibly a larger verdict would result. Therefore, he deemed it his duty in behalf of the city to secure a settlement which would reduce the amount to be paid as much as possible, and he secured a settlement by the terms of which the city paid something like \$5,000 less than the amount of the judgment against it.

This \$5,000 reduction did not, however, benefit Baird. The city took care of itself and let Baird go, although the record tends to show that not only did the city have this \$10,000 bond, but it also had a bond given by Baird when he entered into the contract, which covenanted for faithful performance of all the conditions of the contract, and against the sureties upon that bond it seems the city has also proceeded. If that bond is good — and the record contains no hint to the contrary — the reason assigned by counsel for securing a reduction of the judgment so far as the city is concerned seems inadequate and it becomes very difficult, therefore, to understand why it was insisted that the city should settle against the protest of Baird, who asserted persistently his anxiety to have the judgment reviewed by the appellate court. Baird's counsel says under oath that he protested against it with all possible vigor, and in that respect he is not contradicted by the assistant corporation counsel, who seems to have been equally determined that so far as the city was concerned the judgment should be compromised.

We have then a situation where after consultation between the counsel for Baird and the representative of the corporation counsel an appeal was taken to the Appellate Division by the city and Baird, and steps taken toward making a case; but before it was possible for it to be argued the municipal authorities changed their position and settled the judgment.

It would be strange indeed if as a result of such action the city of New York could recover on the bond should the con-

tinuance of the appeal by Baird result in a reversal of the judgment without possibility of a recovery against him on a new trial. And on the other hand it would equally offend against justice to deprive the municipality of the benefit of the wisdom of its officers should it happen that they were wise in concluding either that the judgment would not be reversed or, if reversed, that it would be for technical reasons, with the result that the subsequent verdict would be for an equal or greater amount.

Our conclusion is that — reading this bond, as we should, in the light of the circumstances surrounding its execution, and the contract under which the money was being held by the comptroller, for which this bond was to become a substitute, for the protection of the city — the city could not deprive the principal and his sureties of his right of review without taking the chances of loss should such review and a subsequent trial had by reason of it result favorably to the principal; that midway between the two extremes claimed by plaintiff and defendants lies the true position, and the test of it is, Was the action of the municipal authorities complained of taken in bad faith? If so, did it operate to the substantial injury of Baird and the surety? If the first question be answered in the affirmative then the party indemnified cannot recover unless it shows that its action — found by the jury to have been taken in bad faith with the intention of injuring the principal or surety — did not operate to the disadvantage of either, or if it did to some extent, that after deducting the amount of damage done to them there still remained something due on the bond.

The defendants asked to go to the jury upon a number of questions, among others as to whether the settlement of the suit of *Kelly v. Mayor*, was or was not made in bad faith and collusively and without respecting the rights of the indemnitors. The court denied defendants' application and directed a verdict in favor of plaintiff, which he afterwards set aside. The judgment of the Appellate Division sets aside the order of vacatur and restores the original judgment, thus

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depriving defendants of the opportunity of having the question of good faith and fair dealing on the part of the municipal authorities passed upon, and if this be error then this court should reverse the Appellate Division that defendants may have a chance to ask a jury to pass upon this question of fact.

And it is error if there was evidence sufficient to make it a question for the jury, and it seems to us that there is no room for doubt on that subject.

When this defendant company was invited to become surety on Baird's bond, the action of Kelly against the city was pending, and the municipal authorities, as well as Baird and the surety company, well knew that if a substantial judgment should be obtained by the plaintiff there would be an appeal. Upon the trial the learned assistant to the corporation counsel took part, and after the trial had a consultation with the counsel for Baird, during which he denounced the verdict as outrageous, and expressed the opinion, as he admits, that a new trial could probably be obtained. He served a notice of appeal and ordered the stenographer's minutes, after which he entertained the overtures for a settlement made by plaintiff's counsel, and insisted that Baird should join with him, and when Baird's counsel said his client would not do it, but would "fight to the finish," the city settled by paying \$5,000 less than the judgment, but left the judgment intact as against Baird. And of all this the surety was not advised, and it was not given an opportunity to say whether it would further indemnify the city on the condition that the city would either prosecute the appeal or permit the surety to do so. And the only excuse suggested for its action is that, while counsel thought that there might be a reversal, he believed there would be another recovery in as great and, perhaps, greater amount, and, therefore, he deemed it wise for the city to secure a reduction of \$5,000, inasmuch as the bond of defendants amounted to but \$10,000. But after this settlement the city brought an action on the bond executed at the time of the making of the contract, and conditioned for the faithful

performance of all its covenants, in which it sought to recover the full amount of \$17,500 paid in settlement of the judgment. That action was pending at the time of the trial of this one, and, with the other evidence adduced on that subject, tended strongly to show that the officers of the city were not called upon to take the position they did and settle the judgment against the earnest protest of Baird, for it was amply protected in any event.

These prominent facts, together with other facts and circumstances presented by the record, should, we think, have gone to the jury so that it might pass upon the good faith of the city's action, upon the same principle as that underlying the case of *Wheeler v. Sweet* (*supra*).

The judgment should be reversed and a new trial granted, with costs to abide the event.

Haight, Vann, Cullen and Werner, JJ., concur; Gray and Martin, JJ., absent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THOMAS TOBIN, Appellant.

1. MURDER — SUFFICIENCY OF EVIDENCE — INSANITY. The evidence upon the trial of an indictment for murder reviewed and held sufficient to sustain a verdict convicting the defendant of the crime of murder in the first degree, including, as an essential part of such verdict, the finding that the defendant was sane when he committed the act.

2. WHEN COURT IS JUSTIFIED IN REFUSING TO APPOINT COMMISSION UNDER THE STATUTE (CODE CRIM. PRO. § 658) TO EXAMINE DEFENDANT AND REPORT AS TO HIS SANITY. Where a trial court, at the request of counsel for a defendant charged with the crime of murder, at the time the indictment was moved for trial, appointed two expert physicians to examine the defendant and report as to his sanity, and adjourned the trial until such report could be made, and the physicians, after making an examination, reported that in their judgment the defendant was sane, in which opinion a third physician, who at one time had charge of defendant, concurred, the court is justified, in the exercise of sound discretion, in denying a motion made in behalf of defendant, based upon the affi-

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davits of his attorneys, for a commission, pursuant to section 658 of the Code of Criminal Procedure, to examine the defendant and report to the court as to his sanity at the time of the examination, where no evidence is presented to controvert the report of the medical experts, who examined the defendant, and to show that he was insane, except the affidavits of his counsel, which contained few facts and consisted mainly of the expression of their own opinions, unsupported by the affidavit of any physician.

3. INSTRUCTION AS TO PRESUMPTION OF SANITY OF DEFENDANT. An instruction to the jury that "if evidence is given tending to establish insanity, then the general question is presented * * * whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt," must be considered as embodying the correct rule upon the subject.

4. SAME — TRIAL COURT NOT BOUND TO CHARGE REQUEST OF COUNSEL WHERE SUBSTANTIALLY THE SAME PROPOSITION HAS ALREADY BEEN CHARGED. Where the court has carefully defined reasonable doubt and has charged in various ways that the jury must be convinced of the defendant's guilt beyond a reasonable doubt, and that if there is a reasonable doubt as to his sanity he is entitled to the benefit of that doubt, the refusal to charge substantially the same propositions in the language of defendant's counsel does not constitute reversible error.

5. SAME — EXAMINATION OF ALLEGED ERROR IN CHARGE — WHEN SUCH ERROR CANNOT BE REVIEWED WITHOUT AN EXCEPTION THERETO — EFFECT OF SECTION 528, CODE OF CRIMINAL PROCEDURE. An instruction by the trial court that it is "not necessary that every circumstance should be proved beyond a reasonable doubt," does not constitute reversible error where it is apparent that the court did not mean that every circumstance constituting a link in the chain of circumstances necessary to establish "the fact of killing by the defendant" need not be proved beyond a reasonable doubt, but that every incidental circumstance, such as those bearing upon the probabilities that the main circumstances were true, or that every fact essential to convict, such as "the death of the person alleged to have been killed," need not be proved beyond a reasonable doubt; moreover, such instruction cannot be reviewed under the statute (Code Crim. Pro. § 528) in the absence of a specific exception thereto, when the court is satisfied that the verdict is right and based upon evidence that is clear and convincing.

(Argued October 15, 1903; decided October 27, 1903.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for the county of New York December 22,

1902, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Henry W. Unger and *Abraham Levy* for appellant. In weighing the evidence upon the issue of insanity, the People are not entitled to have thrown in the scale, in their favor, any presumption of sanity. (*O'Donnell v. Rodiger*, 76 Ala. 222; Best on Evi. [8th ed.] 304; *Justice v. Lang*, 52 N. Y. 329; *Graves v. Colwell*, 90 Ill. 615.) It was error for the court to refuse the request to charge that, if the jurors entertain a reasonable doubt, from the evidence in the case, as to the sanity or insanity of the defendant at the time of the commission of the act charged in the indictment, he is entitled to the benefit of that doubt and must be acquitted. (*Walker v. People*, 88 N. Y. 89.)

William Travers Jerome, District Attorney (*Howard S. Gans* of counsel), for respondent. The court charged properly as to the burden of proof upon the issue of sanity. (*Brother-ton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 377; *Walker v. People*, 88 N. Y. 81; *People v. Egnor*, 175 N. Y. 427; *People v. Leonardi*, 143 N. Y. 360.) The court charged clearly that the prosecution must establish the defendant's sanity beyond a reasonable doubt, and it was not error to refuse to charge the same matter in the language requested by the defendant's counsel. (*People v. Pallister*, 138 N. Y. 601.) No error is presented in the instructions on the weight and effect of circumstantial evidence. (*People v. Leonardi*, 143 N. Y. 360.) The refusal to appoint a commission to determine the defendant's sanity at the time of the trial was a proper exercise of discretion on the part of the court and resulted in no prejudice to the defendant. (*People v. McElvaine*, 125 N. Y. 596.)

VANN, J. The homicide which is the subject of this appeal occurred on the 27th of September, 1902. The next

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month the defendant was indicted, and on the 16th of December following, after a trial which lasted eight days, the jury found him guilty of murder in the first degree and judgment was pronounced accordingly. The counsel who conducted the trial are entitled to the thanks of the court and of the public for the thorough investigation made and the prompt disposition of this important case.

The defendant is thirty-seven years old and has spent about nineteen years of his life in prison. The offenses for which he was thus punished were crimes against property and he does not appear to have been charged with a crime against the person until the present accusation was made against him. In October, 1898, he was transferred from the state prison at Dannemora, where he was confined for grand larceny, to the Matteawan Insane Asylum for custody and treatment as an insane convict. On the 13th of December, 1900, he was returned to prison "as recovered." At the time of the homicide he was employed as a waiter at No. 38 West 29th street, in the city of New York, known as the Empire Café, a place of resort for prostitutes and their patrons. At one o'clock on the morning of September 27th, 1902, the police, according to their custom, cleared the place of all occupants except the employees, and during the rest of the night the door leading from the street to the first floor was locked, but access to the premises could be had through a Chinese restaurant in the basement. About an hour later, James Craft, a resident of Staten Island, forty-six years of age, and already under the influence of liquor, entered the basement, where a prostitute began to talk with him, and, upon the suggestion of the defendant, all three went upstairs into the café. The defendant brought in beer and whisky ordered by Craft, who, in paying therefor, exhibited a roll of bills amounting to twenty-five or thirty dollars. After that all the employees and other persons left the place, some through the efforts of the defendant, except himself, Craft and McEneaney, who was the barkeeper. Craft and the defendant continued to drink until both were intoxicated, and at about five o'clock in the morning there was talk between

them, approaching a quarrel, about some change claimed to be due after paying for drinks. After this discussion ended there was silence for about twenty minutes, and McEneaney, who was behind the bar where he could hear but could not see what was going on, testified that he then heard a thud followed by a fall. Going to the door he saw Craft on the floor, bleeding and senseless, and the defendant was jumping on him, tearing his clothes and kicking him. Craft's face was swollen and covered with blood. McEneaney went over to the defendant, pushed him away and asked him what he was doing. He made no reply, but went downstairs, while McEneaney tried to pour some brandy down the throat of the injured man, but did not succeed "because his teeth were clinched." During his effort he got some blood on his hands, and while he was washing it off in another room the defendant returned, seized the body by the feet and was dragging it downstairs, the head bumping on the steps, when McEneaney took hold of the arms and helped carry the man to the foot of the stairs. McEneaney then said: "Open the Chinese door and give him some air." The body was put down, the defendant went into the Chinese restaurant, McEneaney went upstairs for some more brandy and on his return the defendant had the body in the cellar under the basement, and was standing over it with a butcher's cleaver in his hand. The head was nearly off and the defendant struck the body once with the cleaver in the presence of McEneaney, who asked him what he was doing and pushed him back, but was told to mind his own business. He was afraid the defendant was going to hit him, and when told to take off his shirt, which was bloody, he did so, in fear of his life, and as the shirt came off over his head he pushed Tobin "with shirt and all" and ran upstairs. He put on his coat and hat, took a drink, picked up a bottle to defend himself and went downstairs quietly, where he saw the defendant holding the head, severed from the body, in his hands and walking toward the furnace in the cellar. He then ran out of doors, called a cab, drove to a station house and informed the police. This is an outline of the story told by

McEneaney, who was jointly indicted with the defendant, but was not tried with him. It was corroborated in nearly all respects by the testimony of several witnesses.

When the police arrived they found the body entirely naked, concealed under some rubbish in the cellar. There was a pool of blood two feet wide near the furnace, with a trail of blood leading to the furnace door. The head and clothing, half charred, were in the furnace, where a fire had been kindled but was nearly out, as the draft did not work. The defendant was found with blood on his hands and clothing hiding in the saloon. He had in his pocket thirty-six dollars in bills, besides some silver and coppers. A cleaver, old and with a rough edge, was picked up in the café and was identified as one kept for use in the Chinese restaurant.

The physician who made the autopsy found all the organs of the body in a healthy condition. Thirteen different blows had been struck with an instrument having more or less of a sharpened edge before the head had been severed. There was a fracture of the skull, which would probably have caused death in time, but the surgeon was of the opinion, from the flow of blood and other physical signs, that the man was alive and the heart still beating when his head was cut off.

We will not continue this painful narrative, for the learned counsel for the defendant does not ask us to review the facts; still we have examined them with care, and find that the evidence sustains the verdict, including, as an essential part thereof, that the defendant was sane when he committed the act. The only substantial contest at the trial was over the sanity of the defendant, and upon that issue the weight of evidence was with the People. Four questions of law have been argued before us which we will now consider.

1. On the 4th of December, 1902, when the trial of the indictment was moved, the counsel for the defendant stated that they believed he was insane and asked the court to appoint some competent physician for the purpose of making an examination as to his mental condition. The court there-

upon adjourned until the 8th of December, and in the meantime the justice presiding requested two expert physicians of long experience and high standing to examine the defendant and report as to his sanity. They made an examination and reported that in their judgment the defendant was sane and a third physician, who at one time had charge of the defendant, concurred in that opinion. When the court met pursuant to adjournment a motion was made in behalf of the defendant, based upon the affidavits of his attorneys, for a commission pursuant to section 658 of the Code of Criminal Procedure, but in view of the report of the experts appointed by the court the motion was denied. The case proceeded to trial and it is now claimed that the denial of the motion was reversible error, but we think this point is not well taken.

The statute authorizes, but does not require, the court to appoint a commission to examine "a defendant who pleads insanity" and report "as to his sanity at the time of the commission of the crime;" or when "a defendant in confinement, under indictment," either before or after conviction, appears "to be insane," the court "may appoint a like commission to examine him and report * * * as to his sanity at the time of the examination." (Code Crim. Pro. § 658.) When the motion in question was heard no plea of insanity had been made by the defendant, but this is not important because the application was for a report as to his mental condition at the time of the proposed examination. The court was authorized to appoint a commission for this purpose, provided the defendant appeared to be insane when the motion was made. Since eminent medical experts, appointed informally upon the suggestion of the defendant's counsel, had within a day or two, after personally examining him, reported that he was sane, how could the court decide that he appeared to be insane when no evidence was presented to show it, except the affidavits of the counsel themselves, who did not claim to be experts and who presented no supporting affidavit from any physician? Their affidavits contained few facts and were confined mainly to the expression of their own

opinions. The facts, except the confinement of the defendant in the Matteawan asylum, related to acts and words of the defendant which may have been feigned and which it is reasonable to believe, in view of the testimony subsequently given at the trial, were in fact feigned. The question was within the sound discretion of the court, and we think it was discreetly exercised. The subject was thoroughly discussed in a recent case, the facts of which were so analogous as to make it controlling. (*People v. McElvaine*, 125 N. Y. 596, 605.)

2. In charging the jury upon the question of insanity the court said: "Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence the prosecutor may rest upon that presumption. Without other proof, the fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of the crime by a competent person, but the burden of overthrowing the presumption of sanity or of showing insanity, is upon the person who alleges it. And if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts. And upon this question *the presumption of sanity and the evidence are all to be considered*, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt."

The counsel for the defendant claims that it was error to instruct the jury upon the vital question in the case that the presumption of sanity and the evidence are all to be considered. He argues that the function of the presumption with which the trial starts is ended when evidence has been given tending to show that the defendant is insane; that thereupon the presumption becomes *functus officio* and the case proceeds as if it had never existed; that the burden of proof thus thrown upon the prosecuting officer requires him to establish sanity by evidence, without any aid from the

dead presumption, which is not evidence; that the only use of the presumption is to relieve the People of the necessity of proving sanity in the first instance, and when it has been overthrown by evidence for the defendant, while the jury may consider it they are not required to and should not be told by the court that it is their duty to.

This point was not raised by an exception, and the portion of the charge above quoted was taken *verbatim et literatim* from the opinion in *Brotherton v. People* (75 N. Y. 159, 162). That case has been cited and followed so faithfully for a quarter of a century both by trial courts and appellate courts, including ourselves, that we regard it as the established law of the state, and while we appreciate the argument of counsel upon the subject, discussion is foreclosed, for the question is not open to consideration.

3. The defendant asked the court to charge the jury that if they "entertained a reasonable doubt from the evidence in the case as to the sanity or insanity of the defendant at the time of the commission of the act charged in the indictment he is entitled to the benefit of that doubt and must be acquitted." The court declined to vary his charge and an exception was taken.

In the body of the charge the court carefully defined reasonable doubt and told the jury, among other things, that "Whether the defendant killed Craft is a question of fact which you must determine from all the evidence in the case, and that must be established beyond a reasonable doubt." "If the People have failed to establish by the evidence, beyond a reasonable doubt, that there was premeditation and deliberation, then the prisoner is entitled to the benefit of that doubt." "Before you can find the defendant guilty of murder in the first degree, it is necessary that the facts should satisfy you beyond a reasonable doubt that the defendant struck the deceased with a deadly weapon and that he had in his mind at the time he struck the blow or blows or beheaded him, a deliberate and premeditated design to kill him." "You must be convinced of the prisoner's guilt beyond a reasonable

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doubt. * * *." "If you are satisfied beyond a reasonable doubt of the guilt of the prisoner, it will be your duty to say so." "If a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt." "But it all rests upon your good judgment to determine * * * whether this defendant knew the nature of the crime that he was committing, whether he knew that he was doing a wrongful act or not. If you entertain a reasonable doubt upon that point he is entitled to the benefit of that doubt." "If you reach the conclusion from the evidence that the defendant is innocent, it is your duty to acquit him, but, on the other hand, if you come to the conclusion from the evidence beyond a reasonable doubt that the defendant committed the crime and that he was sane when he committed it then it is your duty to find him guilty."

At the close of the charge the counsel for defendant asked the court to instruct the jury that "When the defense of insanity was interposed in this case and throughout the case this defendant is entitled to the benefit of the reasonable doubt resting upon the question of insanity." The court remarked that he had charged that, and when further asked to charge it in those words said it was unnecessary, but added, "I charge the jury that if they have a reasonable doubt as to his sanity he is entitled to the benefit of that doubt." The learned justice further said: "Gentlemen, after the insanity is first established or the defendant's witnesses give testimony tending to show that the defendant is insane, it then devolves upon the People to satisfy you beyond a reasonable doubt that at the time he committed the homicide he was sane." Upon the request of the defendant he also charged "that the defense of insanity interposed here by the defendant need not be proven beyond a reasonable doubt." Then followed the request, with reference to which the exception was taken.

It is claimed that the court did not make it clear, while the request did, that the defendant should be acquitted if the jury had a reasonable doubt as to his sanity. It would be very remarkable if the jury failed to understand the effect of a

reasonable doubt and that if they entertained it as to any one of the various elements of guilt, they should acquit the defendant. How could they give him the benefit of a reasonable doubt, as they were repeatedly told to in certain contingencies, except by acquitting him? They were told what the People were bound to show beyond a reasonable doubt in order to convict, and that the defense of insanity relied upon by the defendant need not be proved beyond a reasonable doubt. How could they observe these directions or give any effect to them except by finding a verdict of acquittal, if a reasonable doubt existed in their minds as to the sanity of the defendant? We find no error here, for the court, as we have repeatedly held, was not bound to charge in the language of counsel, provided the substance of the request was fairly covered, as we think it was. (*People v. Pallister*, 138 N. Y. 601.)

4. It is further claimed, although the point was not raised by an exception, that it was error for the court to charge that it was not "necessary that every circumstance should be proved beyond a reasonable doubt."

The court did not mean by this that every circumstance constituting a link in the chain of circumstances necessary to establish "the fact of killing by the defendant" need not be proved beyond a reasonable doubt, but that every incidental circumstance, such as those bearing upon the probabilities that the main circumstances were true, or that every fact essential to convict, such as "the death of the person alleged to have been killed," need not be proved beyond a reasonable doubt. (Penal Code, § 181.)

Moreover, it is to be remarked that only errors raised by exception require a new trial, and it is only when we are satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, that we are permitted to reverse whether an exception shall have been taken or not in the court below. (Code of Crim. Proc. § 528.) In this case we think the verdict was right and that it was based upon evidence that is clear and convincing. We

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do not think that it was against the weight of evidence, or against law, or that justice requires a new trial, and hence, owing to the absence of an exception we are not at liberty to exercise a discretion confided to us for the protection of persons under sentence of death, as to whose guilt we may have some doubt. Exceptions are still necessary, notwithstanding the statute, to fully protect the rights, and especially the technical rights, of a person on trial, even for a capital offense. This is just, for if an exception is taken the court, warned by the challenge, may correct the error on the spot and thus avoid the expense and delay involved in case a new trial should be ordered.

As we find nothing to justify a reversal, the judgment must be affirmed.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur.

Judgment of conviction affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM H. ENNIS, Appellant.

1. MURDER—SUFFICIENCY OF EVIDENCE. The evidence upon the trial of an indictment for murder reviewed and held sufficient to sustain a verdict convicting the defendant of the crime of murder in the first degree.

2. SAME—WHEN JUDGMENT CONVICTING DEFENDANT OF MURDER WILL NOT BE REVERSED IN THE ABSENCE OF EXCEPTIONS. A judgment convicting a defendant of murder will not be reversed and a new trial ordered, in the absence of any exception, where the court is satisfied, upon a review of the record, that the evidence well supported the verdict of the jury; that it abundantly established the guilt and the responsibility of the defendant, and that his substantial rights have not been prejudicially affected.

(Argued October 15, 1903; decided October 27, 1903.)

APPEAL from a judgment of the Kings County Court, rendered at a Trial Term May 22, 1902, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

John P. Kelly, John T. Norton and J. Grattan McMahon for appellant. Much testimony was admitted on the trial which was clearly immaterial and incompetent, and which, though not objected to by counsel for the defense, should not have gone upon the record or have been suffered to remain thereon, and its admission prejudiced the defendant's rights and injured and tended to destroy his defense, and resulted in serious injustice to him. Justice, therefore, requires that a new trial be granted. (*People v. Decker*, 157 N. Y. 195; *People v. Scott*, 153 N. Y. 40; *People v. Shea*, 147 N. Y. 80; *People v. Cignarale*, 110 N. Y. 23; *People v. Kelly*, 113, N. Y. 647; *People v. Hoch*, 150 N. Y. 291; *People v. Young*, 151 N. Y. 210; *People v. Constantino*, 153 N. Y. 24.)

John F. Clarke, District Attorney (Robert H. Roy of counsel), for respondent. The verdict was not contrary to the law or evidence or against the weight of evidence; no injustice has been done the defendant, either in the manner of conducting the trial or by the verdict rendered. (*People v. Tice*, 131 N. Y. 651; *People v. Conroy*, 153 N. Y. 174.)

Per Curiam. The defendant was indicted for the murder of his wife and, being tried upon the charge, was found guilty by a jury of murder in the first degree. The killing is not denied and the evidence upon the trial showed that the crime was committed under circumstances of peculiar atrocity. These facts appeared. About a year after the marriage of the defendant with the deceased, and after the birth of their child in September, 1901, the latter left her husband; went to her mother's residence and dwelt with her thereafter. She then commenced an action for separation upon the ground of cruel and inhuman treatment. A judgment was rendered in her favor by default, which awarded her alimony. A few minutes before seven o'clock on the morning of the fourteenth day of January, 1902, the defendant entered the residence of his mother-in-law; went to her room, and, while she was in bed with his infant child, applying a foul epithet to her, he

shot her in the breast with a revolver. He then said that he was going to shoot his wife and, turning from the bed, met the latter coming from the adjoining room. He told her that he was going to shoot her; struck her; threw her down upon the floor and, disregarding her entreaties not to shoot her, or that she might first be allowed to go to confession, shot her, also, in the breast, with the result of causing immediate death. One of her sisters, who had taken up the child from the bed and held it in front of the defendant, in an effort to prevent the shooting, was threatened, herself, with death, if she did not get out of the way. He then left the house; went to a hotel and was there arrested, while asleep in bed. He stated to the officers, who arrested him, that he knew what he had done and was willing to suffer for it, and he expressed his regret that he had not killed his mother-in-law. He, subsequently, volunteered similar statements, when confronted with his mother-in-law in the hospital. The only defense, which was relied upon at the trial, was that of insanity. Upon that issue testimony was given in his behalf by relatives, friends, associates and medical experts; from which it was made to appear that, when a lad, he had received injuries in his head from a fall; that thereafter, and in later life, he showed symptoms of being afflicted with the disease of epilepsy, manifesting itself, at times, in convulsions, and that he had delusions, inducing acts of violence. According to the evidence of the various lay and expert witnesses, who testified in his behalf, whether from observation, or from examination, they believed him to be of unsound mind and to be a paranoiac. As against the evidence thus adduced upon the question of the defendant's sanity, the People introduced other evidence, in the testimony of medical practitioners and experts, who had capacity to speak, either from acquaintance with, or examination of, the defendant, and in that of various lay witnesses, who were acquainted or associated with him. According to the evidence of the latter class of witnesses, he had been rational in his conduct for several years prior to the date of the occurrences in question, though a hard

drinker, and they had observed none of the usual epileptic manifestations; while, according to the former class, he was, in their opinion, not an epileptic and was merely shamming. In addition to the evidence directed towards showing the sanity, or insanity, of the defendant, the jurors had before them the evidence of his conduct prior to, and immediately following, the killing; from which they were warranted in concluding that he was perfectly rational and not acting under the influence of any delusion, or maniacal attack. Upon the rendition of the judgment of separation and for alimony, he openly declared in court that he would "rot in jail before he would give a cent." Shortly before the killing he had declared his purpose to kill his wife, in a letter and in conversation. In the evening of the day before, he was in a liquor saloon and cashed a check, which he had received from the sale of the furniture in his residence. Later in the evening, and until nearly one o'clock in the morning, he was drinking in another saloon and in conversation with the proprietor of the saloon, invited him to have the last drink he would ever have with him; talked about his mother-in-law and said he would put a bullet in her, as she had made all the trouble between him and his wife. He, then, went to another bar-room, where he exchanged some of his money for the check of the proprietor, payable to the order of his sister. He, next, appeared in the residence of his mother-in-law; where, under the circumstances already narrated, he deliberately shot her and then his wife; the testimony as to those occurrences being given by his mother-in-law and the two sisters of his wife, who were present. From their testimony, it was evident that his conduct in the room was that of a man intending, in cold blood, to commit murder and comprehending, fully, what he was doing and was about to do. Whether, upon a consideration of all the evidence adduced, the defendant was laboring under a defect of reason, or was the subject of an epileptic attack, was a question for the determination of the jurors, as a disputed question of fact. Their verdict is conclusive upon us and we do not see how they could have well

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reached any other determination upon the case than they did.

The defendant does not present to us any exception taken upon the trial, upon which error is predicated as warranting the reversal of the judgment of conviction. He appeals to our power to order a new trial, in the absence of any exceptions, upon the ground that a review of the record shows that justice demands it. We have reviewed the record. We are satisfied that the evidence well supported the verdict of the jury; that it abundantly established the guilt and the responsibility of the defendant and that his substantial rights have not been prejudicially affected. The power conferred upon this court in the review of capital cases is not called into exercise by the appearance of some error, which no exception pointed out and which cannot be seen to have affected the substantial rights of the accused. The demands of justice have been satisfied in the trial which has been had and, upon the whole case, we reach the conclusion that no sufficient grounds have been presented, and none exists, to justify a reversal of the judgment of conviction.

PARKER, CH. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment of conviction affirmed.

ROBERT S. HALL, Respondent, v. THE CITY OF NEW YORK et al., Appellants, et al., Respondents.

APPEAL — MODIFICATION OF JUDGMENT. Where, in an action to foreclose a mechanic's lien, a judgment has been entered which does not give to a claim the priority over all the other claims to which it is entitled, but places it last in the order of payment, and the claimant appeals, perfecting his appeal as to some of the parties, but not as to the others, the judgment should be modified, where it can be done without doing injustice to any of the parties, by giving the claimant priority over those claimants against whom he perfected the appeal.

Hall v. City of New York, 79 App. Div. 102, modified.

(Argued October 19, 1903; decided October 27, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 30, 1903, affirming a judgment in favor of plaintiff and certain of defendants entered upon the report of a referee establishing the validity and priority of certain liens and claims filed against the city of New York.

John Quinn for the Western National Bank, appellant. The Appellate Division had the power and should have modified the judgment in accordance with the undoubted law of the case so as to give preference to the claim of the bank. (Code Civ. Pro. § 3401.)

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for the city of New York, appellant.

Frederick P. Bellamy and *I. N. Sievwright* for plaintiff, respondent. It is admitted upon the record that no appeal to the Appellate Division was taken by the appellant, the Western National Bank, against the plaintiff or his judgment herein. It follows, therefore, that the portions of the judgment herein which established the validity and priority of plaintiff's lien and judgment over the claim and assignment of the appellant, the Western National Bank, is *res adjudicata*, and binding and conclusive against the said appellant, and cannot be affected by this appeal. (*West v. Place*, 80 Hun, 255; *Hiscock v. Phelps*, 2 Lans. 106.) The appellant, the Western National Bank, having failed within the proper time to serve its notice of appeal to the Appellate Division either upon the clerk of the court, or the "adverse party," within the meaning of section 1300 of the Code, its appeal is ineffectual for any purpose and must be dismissed. (*West v. Place*, 80 Hun, 255; *Hiscock v. Phelps*, 2 Lans. 106; *Cotes v. Carroll*, 28 How. Pr. 436.) The attempt of the appellant, the Western National Bank, to use the appeal of the city to attack in this court plaintiff's judgment, which it has not appealed from, must fail. (*Wait v. Van Allen*, 22 N. Y.

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321; *Clapp v. Hawley*, 97 N. Y. 613; *Murdock v. Jones*, 3 App. Div. 223; *Stanton v. Gohler*, 19 Misc. Rep. 383.)

Theodore S. Rumney, Jr., for David J. Dannat et al., respondents. This court has no power to modify the judgment so as to give the Western National Bank a preference over the respondents Dannat and Pell. (*West v. Place*, 80 Hun, 255; *Cotes v. Carroll*, 28 How. Pr. 436; *Hiscock v. Phelps*, 2 Lans. 106.)

Clarence Edwards for William C. Card, respondent. This court will not assume original jurisdiction by changing the order of precedence. (*Benedict v. Arnoux*, 154 N. Y. 715.)

John T. Suckett for Otto E. Reimer Company, respondent. The failure of the defendant Western National Bank to perfect its appeal as to the plaintiff and some of the defendants requires that the appeal of the bank be dismissed. (*West v. Place*, 80 Hun, 255.)

Robert H. Wilson for Yellow Pine Company, respondent.

James F. Quigley for Christian Zieseniss, respondent.

Per Curiam. The only questions which this court deems it necessary to consider arise upon the appeal of the Western National Bank. As to all the other questions involved we concur in the conclusions of the court below. If the bank had properly appealed to that court, and served its notice of appeal upon all the parties, it is obvious that the error of the referee in subordinating its claim to those of the parties who had filed mechanics' liens would have been corrected. But by reason of its negligence in that respect the learned Appellate Division was required to hold that it could not, in justice to the other parties, either reverse the judgment entered upon the referee's report, or modify it by giving to the claim of the bank the full preference to which it was justly and legally entitled. This conclusion was based upon the fact

that the judgment was final and binding upon the bank, which had not appealed as to the plaintiff. The court below were of the opinion that if it could modify the judgment by determining the questions between the remaining parties who were before the court without working injustice to those whose interests were involved, it would be its duty to modify it in accordance with the law. In that it was obviously right: It was, however, of the opinion that that could not be done either in whole or in part. We think otherwise, and that the judgment can be modified in part without injustice to any of the parties. The defendants Zufall, Yaeger and Bogardus, although not served with a notice of the bank's appeal, were preferred lienors and their claims were entitled to preference over the claims of all the other lienors and were, therefore, superior to those of any of the other parties including the bank who did not appeal as to them. Consequently, the allowance of the bank's claim would not have affected them, as the fund was entirely sufficient to pay the amount of their liens as well as the claim of the bank. Under the judgment, from which no appeal was taken, the plaintiff's claim was also superior to that of the bank. Moreover, the plaintiff's claim could not be made superior to those of the Yellow Pine Company, Shuldiner or Dannat & Pell without working injustice to them, and, hence, the court was right in refusing to modify the judgment so far as it would affect their claims. But as the claims of Zieseniss, Reimer Company and Card were subsequent to that of the plaintiff, so that they would not be affected by the failure of the bank to appeal as against the plaintiff, and as the bank appealed as to them, we are of the opinion that the court below should have modified the judgment by placing the bank's claim in the order of payment immediately after the plaintiff's, and that the payment of the claim of the bank should have been given preference over their claims. Hence, we conclude that the judgment should have been modified by the court below so as to provide for the payment of the various claimants in the following order: Zufall, Yaeger, Bogardus, Yellow Pine

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Company, Shuldiner, Dannat & Pell, Robert S. Hall, Western National Bank, Zieseniss, Reimer Company, Card.

It follows that the judgment should be modified in accordance with these views, and as thus modified affirmed, with costs to all the parties, to be paid by the city of New York.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment accordingly.

JOHN G. O'KEEFE, as Receiver of THE MATT TAYLOR PAVING COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.

NEW YORK (CITY OF)—INTEREST ON CLAIM AGAINST CITY—RUNS ONLY FROM TIME OF DEMAND OF PAYMENT. When a judgment is recovered against the city of New York for various sums due upon a contract for paving certain streets, interest cannot be awarded upon such claims from the maturity thereof, but only from the time that payment was demanded.

O'Keefe v. City of New York, 86 App. Div. 626, affirmed.

(Argued October 21, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 22, 1903, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order of such trial court reducing the verdict as directed by the amount of interest upon each of the demands sued upon from the date when such demands became due to the date of service of notice of claim upon the comptroller.

This action was brought to recover several installments due under a paving contract providing for the payment of a part of the contract price in ten annual installments.

William A. Barber and *Henry D. Hotchkiss* for appellant. The obligation to pay does not depend upon any demand to be made by the contractor, but follows from the

words of the contract. Under such circumstances the debt carries interest from the day the moneys were payable. (*Van Rensselaer v. Jewett*, 2 N. Y. 135; *de Carricarti v. Blanco*, 121 N. Y. 232; *Adams v. F. P. Bank*, 36 N. Y. 255; *Sanders v. L. S. & M. S. Ry. Co.*, 94 N. Y. 641; *Chester v. Jumel*, 125 N. Y. 237; *Young v. Godbe*, 15 Wall. 565; *R. & I. C. Co. v. R. I. & R. R. R. Co.*, 68 Fed. Rep. 105; *Mansfield v. N. Y. C. & H. R. R. R. Co.*, 114 N. Y. 331; *Wilson v. City of Troy*, 135 N. Y. 96.)

George L. Rives, Corporation Counsel (*Theodore Connoly* and *Chase Mellen* of counsel), for respondent. Interest upon claims against the city runs only from the date of the demand for payment thereof filed in accordance with the Greater New York charter. (*Meyer v. Mayor, etc.*, 12 N. Y. S. R. 674; *Frankel v. Mayor, etc.*, 18 N. Y. S. R. 241; *Taylor v. Mayor, etc.*, 67 N. Y. 87; *Sweeny v. City of New York*, 173 N. Y. 414; *Donnelly v. City of Brooklyn*, 121 N. Y. 20; *Paul v. Mayor, etc.*, 7 Daly, 144; *People v. Canal Comrs.*, 5 Den. 404; *Darlington v. Mayor, etc.*, 31 N. Y. 193.)

Per Curiam. The only question brought up for review is as to the time that interest should be allowed upon the plaintiff's claim. It would be exceedingly difficult for the comptroller of a large city to look up claimants or their heirs or assigns and tender payment as their claims matured and became due. If interest at six per cent is chargeable from the date of the maturity of claims many persons might refrain from presenting them during the period permitted by the Statute of Limitations. The allowing of interest from such maturity would afford a safe and profitable investment which might become very attractive to many and induce them to buy up claims for the purpose of holding them for the interest. This would impose a burden upon the city that it ought not to bear.

The better and more just way is to follow the rule laid down in *Taylor v. Mayor, etc.*, of N. Y. (67 N. Y. 87, 94)

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and *Sweeny v. City of New York* (173 N. Y. 414) and award interest on claims only after the demand of payment has been made.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

WILLIAM N. DYKMAN et al., as Executors of EDWARD T. HUNT, Deceased, Appellants, v. THE UNITED STATES LIFE INSURANCE COMPANY, Respondent.

TRIAL — WHEN QUESTION WHETHER JUDGMENT FOR MONEY MAY BE RECOVERED IS DEPENDENT UPON DECISION OF EQUITABLE QUESTIONS THE ISSUE IS NOT TRIABLE BY JURY, AS A MATTER OF RIGHT, UNDER CODE CIV. PRO. § 968. An action brought by the executors of a decedent demanding judgment that a contract of annuity between decedent and a life insurance company be adjudged void and be canceled and set aside and that the plaintiffs recover from defendant the amount paid by decedent for the annuity with interest thereon less the amount of annuities paid with interest thereon, is an action praying for the relief that only a court of equity can grant, and the plaintiffs are not entitled to a trial by jury, as a matter of right, under the provisions of section 968 of the Code of Civil Procedure.

Dykman v. U. S. Life Ins. Co., 82 App. Div. 645, affirmed.

(Argued October 9, 1903; decided October 30, 1903.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1903, which affirmed an order of Special Term denying a motion to strike the above-entitled action from the Special Term calendar and to send it to be tried at a Trial Term before a jury.

The nature of the action, the facts, so far as material, and the question certified are stated in the opinion.

James C. Bergen and *John E. Parsons* for appellants. The allegations of the complaint set forth an action for money had and received; therefore, the issues in this case are prop-

erly triable before a jury and not on the equity side of the court. (*King v. Van Vlek*, 109 N. Y. 363; *Place v. Hayward*, 117 N. Y. 487; *Everett v. Conklin*, 90 N. Y. 645; *Roberts v. Ely*, 113 N. Y. 128; *Chapman v. Forbes*, 123 N. Y. 537; *Hale v. O. Nat. Bank*, 49 N. Y. 631; *Cope v. Wheeler*, 41 N. Y. 303; *Degraw v. Elmore*, 50 N. Y. 1.) The complaint alleges facts constituting this an action at law for recovery of money had and received, the right to which recovery arises *ex æquo et bono*, and to that extent is an equitable right. It is in just such cases that either party may demand a trial by jury. (12 Ency. of Pl. & Pr. 264; *Hudson v. Caryl*, 44 N. Y. 553; *Davis v. Morris*, 36 N. Y. 569; *Bradley v. Aldrich*, 40 N. Y. 510; *Stevens v. Mayor, etc.*, 84 N. Y. 296.)

Charles E. Patterson and *Donald B. Toucey* for respondent. Plaintiffs have no right to have this case tried before a jury. (1 Story's Eq. Juris. § 59; *City of Rochester v. Mayor*, 9 Civ. Pro. Rep. 226; *Wright v. Nostrand*, 94 N. Y. 31; *Moss v. Burnham*, 50 App. Div. 301; *Bell v. Merrifield*, 109 N. Y. 202; *Krenzle v. Miller*, 32 N. Y. S. R. 984; *MacKellar v. Rogers*, 109 N. Y. 468; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319; *Lynch v. M. El. Ry. Co.*, 129 N. Y. 274.)

BARTLETT, J. The learned counsel for the plaintiff insists that the complaint sets forth an action for money had and received and that the issues are triable by a jury.

A carefully drawn complaint, covering nine printed pages, sets forth in substance that plaintiff's testator, within five months of his death, purchased an annuity of the defendant when he had long been addicted to habits of gross intemperance, which led to a diseased, disordered, irrational and unsound mental condition, of which defendant had due notice.

That plaintiff's testator paid \$100,000 for an annuity of

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\$7,640.00 during life, payable in quarterly payments of \$1,910; that one quarterly payment was paid and before another became due the testator died.

There are other allegations in the complaint that need not be referred to at this time.

The prayer of the complaint is, in substance :

1. That the contract of annuity be adjudged void and that the same be canceled and set aside.

2. That the defendant be adjudged to pay to the plaintiffs the sum of \$100,000.00, with interest, less any sum, with interest, that defendant has paid out under the contract.

3. Prayer for costs.

This is an action in equity praying for relief that only a court of chancery can grant.

The learned Appellate Division has certified to us this question :

“ Are the plaintiffs in this action, upon the pleadings herein, entitled as a matter of right to a trial by jury, under the provisions of section 968 of the Code of Civil Procedure ? ”

The question is answered in the negative.

The order appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, MARTIN, VANN and WERNER, JJ., concur; CULLEN, J., not sitting.

Order affirmed.

THE SOUTH BUFFALO RAILWAY COMPANY, Appellant, v.
HENRY D. KIRKOVER et al., Respondents.

RAILROADS—EMINENT DOMAIN—MEASURE OF DAMAGES WHERE A PORTION OF A TRACT OF LAND IS TAKEN. Where land is acquired by a railroad company without the consent of the owner, he is entitled to recover the market value of the premises actually taken and also any damages resulting to the residue, including those which will be sustained by reason of the use to which the portion taken is to be put by the company.

South Buffalo Ry. Co. v. Kirkover, 86 App. Div. 55, affirmed.

(Argued October 5, 1903; decided October 30, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 23, 1903, which affirmed an order of Special Term confirming the report of commissioners in condemnation proceedings.

This is a proceeding brought by the railroad company under the Condemnation Law to acquire for its corporate purposes nearly eight acres of land owned by the defendants. Commissioners were duly appointed, who awarded the sum of \$10,500 for the land actually taken and the sum of \$41,500 as compensation for the damages "to the remainder of the parcel of land owned by said defendants, out of which the lands and premises described in said petition and order are taken, * * * caused by the taking of the land described in this proceeding, and the use thereof for railroad purposes in the manner and to the extent shown by the evidence and the proceeding aforesaid. * * *"

The Special Term confirmed this report and the Appellate Division affirmed the order of the Special Term to that effect, with a divided court. From the order entered on this determination the present appeal is taken.

The land sought to be acquired in this proceeding is a part of about sixty-nine acres of vacant land situated in the southerly portion of the city of Buffalo.

John G. Milburn and *Frank Rumsey* for appellant. The commissioners adopted an erroneous rule or principle in awarding compensation for alleged damages to the portion of the tract not taken resulting from the operation of the railroad upon the part taken, and the obstruction to the view due to the embankment on which the railroad is built. (L. 1850, ch. 140, § 16; Code Civ. Pro. § 3370; *A. B. N. Co. v. N. Y. E. R. R. Co.*, 129 N. Y. 272; *Bohm v. M. E. R. Co.*, 129 N. Y. 585; *A. N. R. R. Co. v. Lansing*, 16 Barb. 68; *Matter of U., etc., R. R. Co.*, 56 Barb. 464; *Matter of N. Y. E. R. R. Co.*, 36 Hun, 427; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Newman v. M. E. R. Co.*, 118 N. Y.

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618; *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Bellinger v. R. R. Co.*, 23 N. Y. 48; *Uline v. R. R. Co.*, 101 N. Y. 98; *Moyer v. R. R. Co.*, 88 N. Y. 351.)

Wilson S. Bissell and James McC. Mitchell for respondents. The award of the commissioners was proper and should be confirmed. (*Matter of P. P. & C. I. R. R. Co.*, 85 N. Y. 489; *Perkins v. State of New York*, 113 N. Y. 660; *Matter of Thompson*, 121 N. Y. 277; 127 N. Y. 463; *Syracuse v. Stacey*, 45 App. Div. 249; *M. Ry. Co. v. O'Sullivan*, 6 App. Div. 571; *Matter of Daly v. Smith*, 18 App. Div. 194; *Vil. of Port Henry v. Kidder*, 39 App. Div. 640; *Matter of Mayor, etc.*, 40 App. Div. 281; *H. R., etc., R. R. Co. v. Reynolds*, 50 App. Div. 575; *Matter of Grade Crossing Comrs.*, 52 App. Div. 27; *Matter of Grade Crossing Comrs.*, 52 App. Div. 122; *Matter of M. Ry. Co. v. Comstock*, 74 App. Div. 341.)

BARTLETT, J. The single question of law presented by this appeal is as to the rule which should govern the commissioners in awarding compensation for damages to the part of the tract of land not taken.

The counsel for the appellant railroad company insists that the proper rule as to damages, in addition to those allowed for the land actually taken, may be thus stated: "Compensation is only allowed for such damages to the residue as are caused by the severance from it of the part taken, and (according to some of the cases) in estimating such damages the grade or elevation of the railroad may be taken into account as an element of the severance."

The learned Appellate Division in its opinion states the rule to be, that the owner is entitled to recover the market value of the premises actually taken by such railroad company, and also any damages which resulted to the portion of his premises not taken, not only by reason of the taking of the property acquired by the railroad company, but also by reason of the use to which the property was put by the company.

It has been frequently pointed out in judicial opinions that there has been great conflict of authority in this state as to which of the rules above stated was best calculated to do justice between the parties.

The early cases in the Supreme Court laid down the rule insisted upon by appellant's counsel. (*Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *Albany Northern R. R. Co. v. Lansing*, 16 Barb. 69; *Canandaigua & N. F. R. R. Co. v. Payne*, 16 Barb. 273; *Matter of Union Village v. Johnsonville R. R. Co.*, 53 Barb. 457; *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104; *Albany & Susquehanna R. Co. v. Dayton*, 10 Abb. Prac. Repts. [N. S.] 183.)

In *Matter of Utica, C. & S. Valley R. R. Co.* (56 Barb. 456) the General Term held that when land is taken for the construction of a railroad without the consent of an owner, compensation to be paid therefor is not limited to the actual value of the land taken and the depreciation of the residue of the lot from which it is taken by such separation; but the owner is entitled to recover also for any depreciation caused by the use to which it is appropriated. This case was followed in *Matter of N. Y. C. & H. R. R. Co.* (15 Hun, 63) and *Matter of N. Y., Lackawanna & Western Ry. Co.* (29 Hun, 1).

The tendency of judicial decisions in the Supreme Court has been in favor of the more liberal rule adopted by the court below in the case at bar.

Our attention has not been called to any case in this court where the question was presented under the precise state of facts disclosed by this record.

In *Henderson v. N. Y. C. R. R. Co.* (78 N. Y. 423) it was held that in a proceeding by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is: *First*. The full value of the land taken. *Second*. The fair and adequate compensation for the injury the owner has sustained and will sustain by the making of the railroad over his land; and for this purpose it is proper to

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ascertain and determine the effect the conversion of the street into a railroad track will have upon the residue of the owner's land.

In *Newman v. Metropolitan Elevated Ry. Co.* (118 N. Y. 618), Judge BROWN (p. 623) uses this language: "The principle upon which compensation is to be made to the owner of land taken by proceedings under the General Railroad Law has been frequently considered by the courts of this state, and the rule is now established, *first*, that such owner is to receive the full value of the land taken, and, *second*, where a part only of land is taken, a fair and adequate compensation for the injury to the residue sustained, or to be sustained, by the construction and operation of a railroad."

The case in which the learned judge wrote was one of that large class of elevated railway cases, in the city of New York, involving injury to the easements of light, air and access, no land being taken.

In *Bohm v. Metropolitan Elevated Ry. Co.* (129 N. Y. 576), Judge PECKHAM uses this language: "Then as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused to such land by the mere taking of the property, or whether in case the proposed use of the property taken should depreciate the value of that which was not taken, such proposed use could be regarded and the depreciation arising therefrom be awarded as a part of the consequential damages suffered from the taking. I think the latter is the true rule." The learned judge cites *Henderson v. N. Y. C. R. R. Co.* (78 N. Y. 423, 433); *Newman v. Metr. El. Ry. Co.* (118 N. Y. 618); *Matter of Brooklyn Elevated R. R. Co.* (55 Hun, 165, 167), adding: "The question might be of great importance where there was an injury to the remaining land, but if there has been no injury, the inquiry as to the scope of the liability for damages is not material." This was also an elevated railroad case, involving only the injury to easements and no land was taken.

It may be true, as stated by appellant's counsel, that the

precise question now presented has never been passed upon by this court. It is, however, equally true that the decisions in the Supreme Court and in this court tend strongly to the recognition of the more liberal rule.

Considering the principle involved, unembarrassed by legal decisions, it is reasonable that where the state, in the exercise of the right of eminent domain, sees fit to take the property of the citizen without his consent, paying therefor such damages as are the result of the taking, the commissioners in the condemnation proceedings should not only be permitted but required to award the owner a sum that will fully indemnify him as to those proximate and consequential damages flowing from this act of sovereign power.

The exercise of the right of eminent domain is allowed upon the theory that while the taking of property may greatly inconvenience the individual owners affected, it is in the interest and to promote the welfare of the general public. This being so, there is no reason why the citizen, whose land is taken *in invitum*, should suffer any financial loss that may be prevented by awarding him proximate and consequential damages. It may well be that in every case there are remote damages that the citizen, under the circumstances, must suffer. It not infrequently happens that some extensive public improvement, as the construction of a great reservoir in the vicinity of a large city like New York, drives families from old homesteads occupied for generations, and submerges the entire property. It is apparent that in such cases no reasonable and lawful rule of damages can fully compensate the land-owners thus dispossessed.

In the case at bar we have the ordinary and usual situation, where the commissioners have reported in favor of paying the owner the value of the land taken, and the damage to the balance by reason of the severance, and the use to which the property taken is to be put by the railroad company.

It is insisted on behalf of the appellant that the commissioners erroneously took into account as factors causing damage the use to which the property was to be put; that is, the

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operation thereon of a railroad, with its smoke, noise, dust and cinders, and the embankment obstructions to the view. It is also argued that the elevated railroad cases in the city of New York are in a special category and not applicable to the case at bar.

In most of the elevated railroad cases the city owned the fee of the street, the railroad being erected therein by legislative grant, and the original question presented to this court was, whether the injury suffered by the abutting owner to his easements of light, air and access created a cause of action against the railroad company.

It was held in the *Story Case* (90 N. Y. 122) that these easements became at once appurtenant to the land, forming an integral part of the estate and constituted property within the meaning of the State Constitution (Art. 1, § 6), which prohibits the taking of private property without just compensation. It therefore followed that in the trial of the elevated railroad cases any evidence was competent tending to show injury to these easements of light, air and access, as they were property. A similar rule of evidence is applicable to the case before us.

The difference between the elevated railroad cases and this case is not material. In this case, as in the elevated railroad cases, one of the questions is as to the damages inflicted upon land not taken, and the inquiry is, to what extent does the use of the railroad on the adjacent property taken, damage the property, the fee of which remains in the defendants? This property is the land and its appurtenances. Any evidence tending to legally establish the amount of this damage is competent.

It is to be assumed that the commissioners appointed from time to time in condemnation proceedings are intelligent and competent men, anxious to do exact justice between the parties. It may be further assumed that they will judiciously discriminate between farm lands in the country and property located within the limits of a city, upon which dwellings and other structures may be ultimately erected. In the one case,

under existing conditions, damages might be slight, while in the other very substantial.

In this case it is pointed out in the opinion of the learned Appellate Division that the average amount of damages to the property not taken was \$94,435.00, as fixed by nine witnesses called by the defendants, but the commissioners found the damages to be \$41,500.00

Attention is also called to the fact in the opinion that the average amount of damages fixed by plaintiff's witnesses was much less than the award. It appears by the report of the commissioners that on a number of days, by consent of counsel, they personally inspected the premises involved in this proceeding.

We are of opinion that the rule of damages adopted by the commissioners was the proper one, and that the record discloses no legal error.

The order and judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Order affirmed, with costs.

THE CITY OF BUFFALO, Appellant, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.

APPEAL — POWER OF APPELLATE DIVISION TO REVERSE OR AFFIRM WHOLLY OR PARTLY — CODE CIV. PRO. § 1317. Where a judgment rendered in an action at law or in equity consists of distinct parts so separate and independent in form and nature as to be easily severed and each is in fact a distinct adjudication, the Appellate Division, in the exercise of a sound discretion, may upon appeal affirm the adjudication not affected by error and reverse the adjudication which is affected by error and grant a new trial as to that portion of the issues only, the application of the rule depending upon the form and nature of the judgment rendered rather than upon the forum of the action.

City of Buffalo v. D., L. & W. R. R. Co., 81 App. Div. 655, affirmed.

(Argued October 8, 1903; decided October 30, 1903.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 26, 1903, which denied a motion to amend a judgment of that court on appeal.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles L. Feldman, Corporation Counsel (*Edward L. Jung* of counsel), for appellant. The Appellate Division has no power or authority to make the order it did make in this case. (Code Civ. Pro. § 1317; *Story v. N. Y. & H. R. R. Co.*, 6 N. Y. 85; *Wolstenholme v. W. Mfg. Co.*, 64 N. Y. 272; *Goodsell v. W. U. Tel. Co.*, 109 N. Y. 147; *N. B. Underwriters v. Nat. Bank*, 146 N. Y. 57; *Altman v. Hyfeller*, 152 N. Y. 498; *Wilson v. M. O. Co.*, 170 N. Y. 542; *Arthur v. Griswold*, 55 N. Y. 400; *Pollett v. Long*, 56 N. Y. 200; *Gray v. M. Ry. Co.*, 128 N. Y. 499; *Freel v. Queens County*, 154 N. Y. 661; *Benedict v. Arnoux*, 154 N. Y. 715; *Matter of Chapman*, 162 N. Y. 456; *Van Beuren v. Wotherspoon*, 164 N. Y. 368.)

John G. Milburn for respondent. The judgment of the Appellate Division was proper and authorized in form. (Code Civ. Pro. § 1317; *Kelsey v. Western*, 2 N. Y. 505.)

VANN, J. This action was brought to procure a decree that a strip of land fronting on Buffalo river in the city of Buffalo, situated partly on the east and partly on the west side of Main street, is a public street and to require the defendant to remove certain obstructions therefrom. The action was in equity and while but one decree was entered it consisted of two adjudications resting on separate findings settling different issues, each relating to a distinct piece of real estate, and supported by evidence peculiar thereto. The first adjudication was that the parcel of land on the east side of Main street is a public street of the city of Buffalo and the defendant was required to remove all obstructions that it had placed

thereon. The second adjudication was that the parcel of land on the west side of Main street is not a public street of said city but is the property of the defendant, and the complaint was dismissed as to that parcel. The defendant appealed from the first and the plaintiff from the second adjudication to the Appellate Division, which affirmed as to the latter but reversed as to the former, and ordered a new trial both on the law and the facts as to that branch of the controversy only.

An application was thereupon made by the plaintiff requesting the Appellate Division to so modify its order as to grant "a new trial of the whole action," and from the order denying said motion this appeal was taken, the following question having been certified to us for decision: "Considering that the river frontage west of Main Street involved different issues from the river frontage east of Main Street and that there was a separate adjudication in one and the same judgment by the trial court as to each locality, from each of which a separate appeal was taken; and the Appellate Division having on the appeal of the plaintiff from the adjudication as to the river front west of Main Street affirmed the judgment of the lower court; and having on the appeal of the defendant from the adjudication as to the river front east of Main Street reversed the judgment of the lower court upon the law and the facts and granted a new trial, had the court power to make the order or judgment it did make in conformity with its actual determination of the separate appeals?"

The plaintiff claims that the Appellate Division had no power to grant a new trial as to part of the issues only and that it was its duty to so modify its order as to grant a new trial as to all the issues.

The defendant claims that in an action in equity affecting separate parcels of land, where by distinct adjudications in the same decree the plaintiff succeeds as to one parcel and the defendant as to the other and cross-appeals are taken, the Appellate Division has power to affirm as to the one and

reverse as to the other and to grant a new trial as to such issues only as are affected by the reversal.

When a judgment consists of a single adjudication, such as the recovery of a gross sum of money, even if it is founded upon several causes of action, the rule has long prevailed that the appellate branch of the Supreme Court cannot affirm as to a part and reverse with a new trial as to the remainder only, but the reversal must include the entire judgment and the new trial extend to all the issues. (*Altman v. Hofeller*, 152 N. Y. 498, and cases therein cited; *Van Bokkelen v. Ingersoll*, 5 Wend. 315, 340.)

As judgments in actions at law are usually for a gross sum of money, or for the possession of a single piece of property, the rule has frequently been stated as if it applied only to actions on the law side of the court, with entire accuracy as to the cases to which the rule was applied, but without strict accuracy as to the small number of actions at law in which distinct and separate adjudications are made. In other words, the exception to the general rule has not usually been mentioned in the decision of those cases to which it did not apply.

Where a judgment consists of distinct parts so separate and independent in form and nature as to be easily severed, and each is, in fact, a distinct adjudication, the Supreme Court may upon appeal affirm the adjudication not affected by error and reverse the adjudication which is affected by error and grant a new trial as to that portion of the issues only. This rule has frequently been stated as if it were confined to actions in equity, to which, indeed, it mainly applies, because there are but few judgments except those rendered by courts of equity which consist of distinct and independent adjudications. We think the rule to be applied depends upon the form and nature of the judgment rendered rather than upon the forum of the action and the statute regulating appeals, which simply codifies the practice as it had long prevailed, as well as promptness in the administration of justice, invite this construction. (Code Civ. Proc. § 1317.) Power to "reverse or affirm, wholly or partly," implies that part may be affirmed

and part reversed, because the part not reversed must be affirmed. Thus, if in an action of ejectment for separate parcels of land, each depending upon an independent chain of title, there is a verdict for the plaintiff as to one and for the defendant as to the other, and each party appeals from the separate adjudication against himself, we see no reason why it is not within the power of the court to affirm as to one and reverse as to the other. So when a special verdict by a jury, or separate findings by the court or referee settle the facts as to independent causes of action and distinct adjudications follow in the same judgment, a retrial of all the issues is not required on account of an error affecting one adjudication only. Why should a cause of action, determined without error, be tried over again because another cause of action, joined with it in the complaint, but severed from it in the judgment, requires a retrial? Why should time and money be expended upon a trial which is unnecessary? If the judgment is entire, even if it might have been otherwise, it cannot be so severed on the decision of an appeal as to grant a new trial of part of the issues only without confusion and danger. If, on the other hand, it is comprised of distinct and independent adjudications, we think the Appellate Division has the power to sustain the adjudication which correctly disposes of the issues to which it is confined and allow it to stand, while as to the issues which relate wholly to a separate adjudication, infected with error, a new trial is granted. Inconsistent judgments cannot arise from such a course, because the determination of the one controversy does not involve the other. We also think that while the Appellate Division has this power, it is not obliged to exercise it, but the subject rests in its sound discretion to sever the issues or not, and to award a new trial as to all, or a part only, accordingly. (*Van Bokkelen v. Ingersoll*, 5 Wend. 316, 340; *Smith v. Jansen*, 8 Johns. 111, 116; *Bradshaw v. Callaghan*, 8 Johns. 558, 566; *Altman v. Hofeller*, *supra*; *Wilson v. Mechanical Orquinette Co.*, 170 N. Y. 542, 552; *Gray v. Manhattan Railway Co.*, 128 N. Y. 499, 509; *Story v. N. Y. & H. R. R. Co.*, 6 N. Y. 85, 89, 91; *Frederick v.*

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Lookup, 4 Burr. 2018, 2022.) The subject was so thoroughly considered in the recent case of *Altman v. Hofeller* that further discussion is unnecessary.

The application of the rule to the case in hand requires us to affirm the order appealed from, with costs, and to answer the question certified in the affirmative.

O'BRIEN, BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., absent.

Order affirmed.

WATERTOWN CARRIAGE COMPANY, Respondent, v. EDWIN L. HALL, Appellant.

BANKRUPTCY—DISCHARGE IN, NOT A DEFENSE, OR BAR, TO ACTION FOR EMBEZZLEMENT AND MISAPPROPRIATION OF FUNDS—DEMURRER TO ANSWER SETTING UP SAME AS A DEFENSE. Where the complaint in an action of conversion alleges that the defendant did wrongfully and fraudulently embezzle and misappropriate plaintiff's money, the legal import thereof is that defendant became possessed of the money in a fiduciary capacity, and, hence, his liability thereunder is a liability expressly excepted, by section 17 of the Bankruptcy Law of 1898, from debts released by a discharge in bankruptcy, and defendant's answer setting up his discharge in bankruptcy as a defense, or bar, to the action is demurrable as insufficient in law upon the face thereof.

Watertown Carriage Co. v. Hall, 75 App. Div. 201, affirmed.

(Argued October 14, 1903; decided October 30, 1903.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 24, 1902, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the complaint.

The nature of the action, the facts, so far as material, and the question certified, are stated in the opinion.

C. H. Sturges and *Willard J. Miner* for appellant. The question certified is sufficient to enable this court to determine

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the validity of the judgment from which the appeal is taken. (*Baxter v. McDonnell*, 154 N. Y. 432; *Schenck v. Barnes*, 156 N. Y. 316; *Blaschko v. Wurster*, 156 N. Y. 437.) The defense of the discharge in bankruptcy is sufficient in law. (*Lambert v. People*, 6 Abb. [N. C.] 190; *Matter of Rhutassel*, 2 Am. Bank. Reg. 697; *Morse v. Kaufman*, 7 Am. Bank. Reg. 549; *Gee v. Gee*, 7 Am. Bank. Reg. 500; *Bracken v. Milner*, 5 Am. Bank. Reg. 23; *Perkins v. Smith*, 116 N. Y. 441; *Hennequin v. Clews*, 77 N. Y. 427; *Lawrence v. Harrington*, 122 N. Y. 408; *Mulock v. Byrnes*, 129 N. Y. 23; *Palmer v. Hussey*, 119 U. S. 96; *Noble v. Hammond*, 129 U. S. 65; *Burnham v. Pidcock*, 58 App. Div. 273; *Dimock v. R. C. Co.*, 117 U. S. 559.)

Joseph Nellis and *Levi H. Brown* for respondent. The question certified has no pertinency to any question involved in the decision and judgment appealed from, and, hence, presents no question which this court will review or determine. (*Steinway v. Bernette*, 167 N. Y. 498; *Matter of Davies*, 168 N. Y. 89; *Schenck v. Barnes*, 156 N. Y. 316; *Matter of Coatsworth*, 160 N. Y. 114; *Matter of Manning*, 139 N. Y. 446; *Matter of Robinson*, 160 N. Y. 448; *Blaschko v. Wurster*, 156 N. Y. 437; *Townsend v. Bell*, 167 N. Y. 462; *Matter of Landy*, 148 N. Y. 403; *Caponigri v. Altieri*, 164 N. Y. 476.) The cause of action stated in the complaint is exempt from discharge under the Bankrupt Law. (*Maillard v. Lawrence*, 16 How. [U. S.] 250; *The Abotsford*, 98 U. S. 440; 6 Am. Bank. Reg. 657; *Uhlman v. Ins. Co.*, 109 N. Y. 426; *Moffatt v. Fulton*, 132 N. Y. 507; *Bank v. Peters*, 123 N. Y. 272; *Baker v. Bank*, 100 N. Y. 31; *Burhans v. Cary*, 4 Sandf. 707; *White v. Williams*, 5 Den. 269; 21 Wall. 368; *Schudder v. Shields*, 17 How. Pr. 420; *Taylor v. Plummer*, 3 M. & S. 562.)

O'BRIEN, J. The complaint in this action alleged that the plaintiff, upon the day specified, was the owner and entitled to the immediate possession of the sum of sixty-five dollars in

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money, consisting of bills, bank notes and currency, but in what particular denominations the plaintiff was unable to more particularly state. That on the day named, prior to the commencement of the action, the defendant did fraudulently and unlawfully convert, misappropriate and embezzle said money; that before the commencement of the action the plaintiff duly demanded the aforesaid sum of money of the defendant, but the defendant refused and still refuses to deliver the same to the plaintiff, and the plaintiff was damaged in the sum of sixty-five dollars, with interest from the day of said conversion, misappropriation and embezzlement. The defendant, among other matters, interposed an answer as a distinct and separate defense to the cause of action stated in the complaint and as a bar to the same a discharge in bankruptcy. To this separate defense the plaintiff demurred, on the ground that it was insufficient in law upon the face thereof, and this demurrer has been sustained by the courts below.

The only question, therefore, presented by this appeal is whether a discharge in bankruptcy is a good defense to a cause of action such as is stated in the complaint herein. There would, I think, be very little difficulty in disposing of this question except for numerous decisions of the courts giving construction to corresponding provisions of the bankrupt acts of 1841 and 1867. These decisions have been elaborately reviewed and discussed by counsel and the difference between these statutes and the present Bankrupt Law pointed out. In the view that we take of the case, it is not necessary to refer to these decisions, since in our opinion they are not controlling, if at all applicable, upon the question now presented.

The order sustaining the demurrer was interlocutory and hence was not reviewable in this court without a certificate from the court below. We have that certificate in the record and the question certified is in these words: "Is a discharge in bankruptcy properly pleaded as a defense to any cause of action alleged in a complaint?" Of course a cause of action

may be stated in a complaint to which a discharge in bankruptcy would be a good defense, but that is an abstract question that is not pertinent to any issue or question in this case, and if we are to take the question literally and according to the clear and broad language employed, there would be nothing in the record that this court has the power to review and the appeal should be dismissed. But, doubtless, it was the intention of the parties and the purpose of the learned court below to have the question arising upon the demurrer finally passed upon by this court. We will, therefore, assume that what was intended by the question was, not whether a discharge in bankruptcy is a good "defense to any cause of action," but whether it is a good defense to the cause of action stated in the complaint in this action. In other words, does the defendant's discharge in bankruptcy protect him in this action from liability resulting from his act in "fraudulently and unlawfully converting, misappropriating and embezzling" the sixty-five dollars of the plaintiff's money?

The answer to that question is to be found in the plain language of the present Bankrupt Law enacted in 1898, as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

The cause of action stated in the complaint is plainly excepted from the operation of the discharge as a release of the defendant from liability. It does release him from certain debts and obligations, but not from liability for the cause

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of action stated in the complaint, and, hence, the answer setting up the discharge as a defense was open to demurrer, and so it has been held since the enactment of the present Bankrupt Law. (*Frey v. Torrey*, 70 App. Div. 166; *affd.* on opinion below, 175 N. Y. 501; *Crawford v. Burke*, 201 Ill. 581.) These views sufficiently answer the question certified as we have construed it. The charge in the complaint is that the defendant did wrongfully and fraudulently embezzle and misappropriate the plaintiff's money, and the legal import of these words is that he became possessed of it in a fiduciary capacity, and so the order appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Order affirmed.

ELLSWORTH C. SMITH, Respondent, v. AMOS S. CHESEBROUGH et al., Respondents, and WILLIAM CRANSTOUN, as Executor of and Trustee under the Will of NICHOLAS H. CHESEBROUGH, Deceased, Appellant.

WILL—WHEN VOID INTERMEDIATE TRUST, CREATED BY CODICIL, MAY BE EXPUNGED WITHOUT CHANGING TESTATOR'S PLAN FOR DISPOSITION OF HIS PROPERTY, THE WILL MUST BE SUSTAINED. Where a testator devised and bequeathed his residuary estate to his executors in trust to pay the income thereof to his wife during her lifetime, with power to sell his real estate at any time during the trust at their discretion, and after her death to transfer the residuary estate to the designated trustees of a permanent trust, and thereafter, after the death of his wife, testator executed a codicil to his will, revoking the provisions therein contained for the benefit of his wife, and directing his executors to hold the residuary estate and invest and reinvest the income thereof until the expiration of two years after his death and then to transfer the residuary estate and the accumulated income thereof to the trustees of the permanent trust, neither the will and the provisions thereof granting the power of sale, nor the provisions creating the permanent trust, are revoked or rendered invalid by the codicil, notwithstanding the direction to hold and invest both principal and income of the residuary estate for the definite period of two years after testator's death before transferring the same to the permanent trustees constituted an unlawful suspension of the power of alienation and provided for the unlawful accumulation of income in vio-

lation of the statute (Real Property Law, §§ 32 and 51; L. 1896, ch. 547), since the invalid provisions of the codicil affected neither the power of sale nor the existence of the permanent trust, but only the time of the inception of the trust, and such provisions can be expunged without making any change in the testator's plan for the disposition of his residuary estate, except that the trustees of the permanent trust take possession thereof upon the testator's death instead of two years later.

Smith v. Chesebrough, 82 App. Div. 578, reversed.

(Argued October 6, 1903; decided October 30, 1903.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1903, which affirmed an interlocutory judgment in favor of plaintiff and defendants, respondents, entered upon a decision of the court on trial at Special Term.

The following are the questions certified: "I. Was not a valid power to sell the real property described in the complaint given to appellant by his testator, Nicholas H. Chesebrough?

"II. Did said Chesebrough's testamentary disposition of said real property illegally suspend the power of alienation thereof?

"III. Should not said Chesebrough's invalid direction to accumulate the rents, interest and income be eliminated by the court and the rest of his testamentary plan upheld?"

The nature of the action and the facts, so far as material, are stated in the opinion.

P. Hurwood Vernon for appellant. The second question, to wit: "Did said Chesebrough's testamentary disposition of said real property illegally suspend the power of alienation thereof?" should be answered in the negative. (*Henderson v. Henderson*, 113 N. Y. 1.) If the power of sale was not revoked by the codicil and if the testator intended that it should be exercised, and the condition of his estate required its exercise, then the real estate was thereby equitably converted even if the power was not in terms imperative. (*Fraser v. Trustees*, 124 N. Y. 479; *Salisbury v. Slade*, 160 N. Y. 278, 289; *Asche v. Asche*, 113 N. Y. 232; *Delafield v.*

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Barlow, 107 N. Y. 535; *Lent v. Howard*, 89 N. Y. 169; *Powers v. Cassidy*, 79 N. Y. 602; *Dodge v. Pond*, 23 N. Y. 69; *Wurt v. Page*, 4 C. E. Green, 375; *Crane v. Bolles*, 4 Dick. 373; *Roy v. Moore*, 2 Dick. 356.) Even if the power of sale given by the will was revoked by the codicil the testator's testamentary scheme does not illegally suspend the power of alienation, as the estate given to the orphan asylum trustees was vested and, therefore, alienable. (*Steinway v. Steinway*, 163 N. Y. 163; *Murphy v. Whitney*, 140 N. Y. 541; *Smith v. Edwards*, 88 N. Y. 102; *Selden v. Pringle*, 17 Barb. 465; *Warner v. Durant*, 76 N. Y. 133; *Campbell v. Stokes*, 142 N. Y. 23; *Levy v. Levy*, 79 Hun, 290; *Kilpatrick v. Barron*, 125 N. Y. 751.) The third question, viz.: "Should not said Chesebrough's invalid direction to accumulate the rents, interest and income be eliminated by the court and the rest of his testamentary plan upheld?" should be answered in the affirmative, because although a valid will is necessary, as claimed by the plaintiff, to withhold the real estate of a decedent from his heirs at law, yet when a will has been duly executed and the testator's object is worthy, it is the duty of the court to sustain the will as far as possible and to cut out invalid provisions. (*Kane v. Gott*, 24 Wend. 641; *Henderson v. Henderson*, 113 N. Y. 1; *Greene v. Greene*, 125 N. Y. 506; *Kalish v. Kalish*, 166 N. Y. 368, 375; *Huscall v. King*, 162 N. Y. 134.) The gift to the persons named in the testator's will for the purpose of founding an orphan asylum is not only valid in New Jersey, but also in New York, such a gift being no longer invalid in this state, because the beneficiaries of the charity are indefinite, or because a trust in perpetuity is created. (L. 1893, ch. 701; *Allen v. Stevens*, 161 N. Y. 122; *Cross v. U. S. T. Co.*, 131 N. Y. 330; *Hope v. Brewer*, 136 N. Y. 126.)

Paul Eugene Jones for plaintiff, respondent. The rights of plaintiff are to be determined as of the day of the death of Nicholas H. Chesebrough. On that day the title to his New York real estate vested in his heirs at law, and the possession

of that real estate can be withheld from the heirs only by one claiming under a valid trust, power in trust or a remainder validly limited. (*Tilden v. Green*, 130 N. Y. 29; *Dammert v. Osborn*, 140 N. Y. 30; *Haynes v. Sherman*, 117 N. Y. 433; *Cochrane v. Schell*, 140 N. Y. 516.) Even if the trust, upon which the trustees of the Chesebrough Protestant Orphan Asylum are to hold the New York real estate when it vests in their possession at the end of the term of two years, is valid, still, if the power of alienation were illegally suspended prior to that time, then the future estate for charitable purposes was "void in its creation." (5 Am. & Eng. Ency. of Law [2d ed.], 902; 1 Fearne on Remainders [4th Am. ed.], 425; *Warren v. Durant*, 76 N. Y. 133; *Tilden v. Green*, 130 N. Y. 29; *Cruikshank v. Home for Friendless*, 113 N. Y. 337; *Urbauer v. Cranstoun*, 60 App. Div. 51; *Booth v. Baptist Church*, 126 N. Y. 215; *Garvey v. McDevitt*, 72 N. Y. 556; *Kilpatrick v. Barron*, 125 N. Y. 751; 2 Perry on Trusts [5th ed.], § 783; *Kirsch v. Tozier*, 143 N. Y. 390; *Waterman v. Webster*, 108 N. Y. 157; *Dammert v. Osborn*, 140 N. Y. 30.) The only gift for the maintenance of the orphan asylum was of a fund to be illegally accumulated, and the gift falls with the direction for illegal accumulation. (*Rice v. Barrett*, 102 N. Y. 161.)

WERNER, J. This is an action for the partition of certain real estate described in the complaint, situate in the counties of New York and Richmond in this state, and of which Dr. Nicholas H. Chesebrough, a resident of the state of New Jersey, died seized on April 6th, 1899. The plaintiff and certain of the defendants, who are collateral relatives and heirs at law of the late Dr. Chesebrough, assert ownership to this real estate by reason of the alleged partial intestacy of the latter, while the defendant Cranstoun and others claim title thereto as trustees under his will and codicil, upon the construction of which the issue depends.

Dr. Chesebrough's will was executed in the state of New Jersey on the 23rd day of October, 1897. It first provided

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for the payment of his debts and funeral expenses and then for certain specific legacies to relatives and various institutions. The residue of the estate he devised to his executors and to the survivor of them, in trust to hold the same, to collect the rents, income and interest therefrom, and to pay them over to the wife of the testator during her life. The executors were also given a power of sale, with discretion as to the time of its execution, and were directed to invest the proceeds of sales, and the interest and income therefrom to pay to the wife during her life.

The foregoing devise to the executors was limited upon the further trust that upon the death of the testator's wife, the residue of the estate and all moneys realized from the investment of the same then remaining, be conveyed and paid over to six designated trustees who were directed to found and erect in the town of Summit, in the state of New Jersey, an institution to be known as "The Chesebrough Protestant Orphan Asylum." The specific directions which relate to the establishment and execution of this ultimate trust are not material to this discussion, but it may be stated in passing that they are concededly valid under the laws of New Jersey, and would be valid in this state if they were to be executed here. (L. 1893, ch. 701; *Allen v. Stevens*, 161 N. Y. 122.)

In February, 1899, the testator executed a codicil in which he made certain changes in specific bequests, revoked the provision for his wife, who had died after the execution of the will, and then directed his surviving executor to invest the net rents, interest and income to be collected by him in safe securities or to deposit the same in bank so as to draw interest until the expiration of two years after testator's decease, and at that time, instead of after the death of testator's wife, "to assign, transfer, convey and pay over" the residue of the estate and all moneys realized from the investment of the same, or of the rents, issues and income thereof, to the six designated trustees for the purposes of the ultimate trust above referred to. In all other respects the original will was ratified and confirmed.

The courts below have held that the power of sale given by the will was revoked by the codicil, and that the direction to the executor in the latter instrument to hold and invest both principal and income for a definite period of two years after testator's death before transferring the same to the ultimate trustees constituted an unlawful suspension of the power of alienation under section 32 of the Real Property Law, which invalidated the will and vested the title to the premises described in the complaint in the plaintiff and the other heirs at law of the testator.

We are unable to concur in that view of the case. While the codicil does direct the surviving executor to hold and invest both principal and income of the estate for a definite period fixed by years instead of lives, and does, therefore, unlawfully suspend the power of alienation and provide for the unlawful accumulation of income (Secs. 32 and 51, Real Property Law), it does not follow that the will must fail altogether. If the invalid parts of the codicil can be expunged without essentially changing or destroying the testator's general testamentary scheme, the valid parts of the will should be upheld under the rule applied by this court in the case of *Kalish v. Kalish* (166 N. Y. 377) and in many other cases there cited. In the *Kalish* case we said: "It is axiomatic that courts cannot make new wills for testators who have failed to make valid wills for themselves. While recognizing the force of this truth, courts have from the earliest times been compelled to choose between the alternatives of setting aside certain wills altogether, or of cutting out simply their void provisions. This necessity has led to the rule which is now firmly established in this state, that when the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be."

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A brief analysis of the will and codicil before us will suffice to disclose the peculiar application of this general rule to the case at bar. In the original will there were, *first*, the specific legacies to various persons and institutions; *second*, the life estate of the testator's wife; *third*, the ultimate trust in the six named trustees for the orphan asylum to be founded. The only relation that the life estate and the ultimate trust bore to each other was that the execution of the latter was to await the termination of the former. The power of sale, although related to each of these estates, is not dependent upon either of them. The direction to sell is peremptory, but the time of its execution is discretionary, so that it clearly survived the life estate. The testamentary scheme of the original will was, therefore, indisputably valid.

The only changes sought to be effected by the codicil were, *first*, the elimination of the life estate, the occasion for which had passed with the death of the testator's wife, and, *second*, the postponement until two years after the testator's death of the physical transfer of the residuary estate and its accumulations to the ultimate trustees. Under the original will the estate devised to the ultimate trustees was a vested remainder, the possession and enjoyment of which depended upon the duration of the life estate of the testator's wife. The ultimate trust was not revoked by the codicil, and the nature of the estate devised to the ultimate trustees was not changed, but the testator made an attempt to postpone the enjoyment thereof which was in contravention of the statute and, therefore, void. By taking out of the codicil the invalid provision for postponement, the only change in the testator's plan for the disposition of his residuary estate is that the physical possession of the remainder is accelerated so as to take effect upon the testator's death instead of two years later. In all other respects the testamentary scheme is not only essentially but literally preserved. By expunging the invalid part of the codicil the testator's partial intestacy is avoided and the real substance of his will is effectuated in its entirety.

The case of *Garvey v. McDevitt* (72 N. Y. 556), relied

upon by the respondents, seems to us clearly distinguishable from the case at bar. In the *Garvey* case the trust was held to have been void in its creation as it could not have been valid without creating an unlawful suspension of the power of alienation during the trust term of four years. In the case at bar we have a trust valid in its inception and remaining so after the excision of the invalid directions in the codicil.

The first, third and fourth questions certified to us are answered categorically in the affirmative. The second certified question is answered in the affirmative as qualified and explained in the opinion. These answers require a reversal of the order and interlocutory judgment appealed from, the dismissal of the complaint, with costs, and final judgment for the appellant in accordance with the foregoing views, with costs in all courts.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and CULLEN, JJ., concur.

Order and judgment reversed, etc.

In the Matter of the Claim of CAROLINE TORGE, Appellant, v.
THE VILLAGE OF SALAMANCA, Respondent.

1. STREETS — CHANGE OF GRADE — PROCEEDINGS FOR DAMAGES CAUSED THEREBY — CONSTRUCTION OF STATUTES RELATING THERETO. The statute (L. 1883, ch. 113, as amd. by L. 1884, ch. 281, and L. 1894, ch. 172) providing that "whenever the grade of any street * * * in any incorporated village shall be changed so as to injure or damage the buildings or real property adjoining such highway, the owners thereof may apply to the Supreme Court for the appointment of three commissioners to ascertain and determine their damages, which damages shall be a charge upon the village * * * chargeable with the maintenance of the street * * * so altered or changed," was not superseded or repealed by the provisions of the Village Law (L. 1897, ch. 414, § 159, and § 342, subd. 4), providing for the assessment and payment of damages when the grade of a street shall be changed by the authorities of a village having the exclusive control and jurisdiction of the street, except in so far as the provisions of the former statute might apply to a change of the grade of a street, within the exclusive control and jurisdiction of a village, when made by the legally constituted authorities thereof.

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2. SAME — WHEN PROCEEDING FOR DAMAGES CAUSED BY CHANGE OF GRADE IN STREET MAY BE INSTITUTED AND MAINTAINED UNDER CHAPTER 113 OF LAWS OF 1883 — PARTIES TO SUCH PROCEEDING. Where a railroad crossing over a village street was changed from a grade to an undergrade crossing by the railway company and the authorities of the village, pursuant to an order of the board of railroad commissioners, acting under the provisions of the Railroad Law relating to the change of railroad crossings at grade, in furtherance of public safety (L. 1890, ch. 565, §§ 62-69), whereby an alteration of the grade of the street in front of property abutting thereon was rendered necessary, the owner of the property may institute and maintain a proceeding for the damages caused by such alteration under chapter 113, Laws of 1883, since all that is necessary to bring the case within this statute is that the grade shall be legally changed or altered; but, as the damages for which recovery is sought were caused by an improvement toward the expense of which the railroad company is required to contribute its ratable proportion, the company is entitled to be made a party to the proceeding, and to be heard therein, as provided by the Railroad Law.

Matter of Torge, 86 App. Div. 211, reversed.

(Argued October 8, 1903; decided October 30, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 30, 1903, which reversed an order of Special Term appointing commissioners to appraise the damages alleged to have been sustained by petitioner by reason of a change of grade in the street in front of premises owned by her.

The facts, so far as material, are stated in the opinion

Niles C. Bartholomew for appellant. Abutting property owners, in incorporated villages, are entitled to damages arising from change of grade of a street, there being statutes giving such right of compensation. (L. 1897, ch. 414, § 159; L. 1883, ch. 113.) Abutting property owners in incorporated villages being given by statute a right of compensation for change of grade of a street, the remedy to enforce such right is not by an action at law, but by a proceeding under the statutes creating the right. (L. 1897, ch. 414, § 159.) Whether the act of changing the grade of Main street was that of the village authorities or the act of the state board of railroad commissioners, in either case the abutting property owner is

entitled to compensation and to maintain this proceeding. (*Matter of Jewell*, 41 N. Y. S. R. 409.) The power to change the grade of a street within an incorporated village is absolute in the municipality. (*Matter of Stack*, 50 Hun, 388; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98.)

G. W. Cole and *Henry P. Nevins* for respondent. Section 159 of the Village Law, giving a right to consequential damages where a change of grade in a village street is effected, does not contemplate a change of grade of this character and in this manner; but has reference to change of grade made by the village, as such, and as to which the village has exclusive power to make the change. (L. 1897, ch. 414, § 159.) To render the village liable it must have exclusive jurisdiction and control of the street, having reference to the change in fact effected, and the exclusive power to make, authorize or to give effect by ratification or acquiescence to the change of grade effected. (L. 1897, ch. 414, §§ 141, 159.) The village ought not to be made liable for damages beyond its proportion, as provided by the law which provides for the establishment of grade crossings, and in accordance with the rules by which such damages are ascertained. (*Fries v. N. Y. & H. R. R. Co.*, 169 N. Y. 270; *Muhlker v. N. Y. & H. R. R. Co.*, 173 N. Y. 549; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Atwater v. Trustees*, 124 N. Y. 602; *Talbot v. N. Y. & H. R. R. Co.*, 151 N. Y. 155.)

CULLEN, J. The petitioner was the owner and possessor of premises in the village of Salamanca, situate at the intersection of Main street and the Erie railroad. In the year 1900 the village by its board of trustees applied to the board of railroad commissioners under the provisions of section 62 of the Railroad Law to have the crossing of the street over the railroad, which at the time was at grade, changed to an undergrade crossing. Such proceedings were had that in April, 1901, the commissioners made an order directing the change to be made according to certain plans and specifications. The improve-

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ment rendered necessary an alteration of the grade of Main street in front of the appellant's premises. Thereupon the trustees of the village passed a resolution changing the grade of the street to accord with the plans of the new crossing approved by the railroad commissioners. Thereafter and within sixty days from the completion of the work the appellant filed a claim for damages arising from the change of grade with the board of railroad commissioners and with the clerk of the village. The trustees of the village failed to agree with the appellant as to the compensation to be made to her. She then applied to the Supreme Court for the appointment of three commissioners to ascertain and determine the amount of her damage. The village resisted the application, filing an answer to the appellant's petition. A trial was thereupon had and an order made appointing commissioners. On appeal the Appellate Division reversed the order of the Special Term and dismissed the proceedings.

As the order of the Appellate Division was a final order an appeal lies to this court. (*Matter of Munn*, 165 N. Y. 149.) We are thus brought to the merits of the controversy. The learned counsel for the respondent contends that the appellant is not entitled to any compensation because the village authorities did not have exclusive power to make the change in the crossing. The learned Appellate Division did not pass on this question but held that if the appellant was entitled to compensation she could not recover it by this proceeding. To determine these questions it is necessary to review the legislation on which the appellant's claim is based. Under the settled law of this state damage caused to an abutter by change of the grade of a street by the municipal authorities was *damnum absque injuria*. (*Radcliff's Exrs. v. Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Heiser v. Mayor, etc., of N. Y.*, 104 N. Y. 68.) The hardship of this rule, however, was early appreciated and legislation was passed to secure abutters who improved their property on the faith of the established grade of a street from alteration of that grade without compensation. So, in 1883, a statute (Chap.

113) enacted that whenever the grade of any street or highway in any incorporated village should be changed so as to injure or damage the buildings or real property adjoining such highway, the owners thereof might apply to the Supreme Court for the appointment of three commissioners to ascertain and determine their damages, which damages should be a charge on the village, town or other municipality chargeable with the maintenance of the street or highway so altered or changed. This statute was amended in 1884 (Chap. 281) and in 1894 (Chap. 172). The amendments relate merely to matters of procedure, the latter statute directing that the provisions of the Condemnation Law should be applicable to the appointment of and the powers and duties of the commissioners appointed under it. In 1897 was enacted the General Village Law (Chap. 414). By section 159 it is provided that "If a village has exclusive control and jurisdiction of a street or bridge therein, it may change the grade thereof. If such change of grade shall injuriously affect any building or land adjacent thereto, or the use thereof, the change of grade to the extent of the damage resulting therefrom, shall be deemed the taking of such adjacent property for a public use." The remainder of the section prescribes the procedure to be followed and is a substantial re-enactment of the previous law on that subject. It is contended by the counsel for the respondent that the village had not exclusive control of the highway at the intersection of the railroad, and a change in the grade of the street at that point could be effected only by an order of the railroad commissioners in proceedings taken under section 62 of the Railroad Law and that hence the appellant's case does not fall within the terms of the section of the Village Law. But to entitle the appellant to compensation it was not necessary that her case should fall within the terms of the Village Law. The provisions of the act of 1883 are broad and comprehensive. They provide that whenever the grade of a street or highway in a village shall be changed the abutter shall be entitled to compensation for damages sustained thereby. "Due notice of such application shall be given to the person or persons having

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competent authority to make such change or alterations." It is then provided that the damages shall be a charge against the village or municipality chargeable with the maintenance of the street or highway. It will thus be seen that all that is necessary to bring a case within the statute is that the grade shall be legally changed or altered; it is not necessary that it shall be changed or altered by the village authorities. All that was decided on this subject in *Matter of Whitmore v. Vil. of Tarrytown* (137 N. Y. 409) was that the village was not liable for the unauthorized acts of its street commissioner. That this is the true construction of the statute of 1883, and that it was not intended by the Village Law to limit the abutter's right to compensation is made clear by section 342 of the latter statute, which reads: "The following acts and parts of acts are hereby repealed: * * * 4. Chapter 113 of the Laws of 1883, and the acts amendatory thereof, so far as they relate to the change of grade of streets or bridges by village authorities." Unless the right of compensation for change in the grade of a street was general and applicable to all cases where the change of grade was made by authority of law and unless it was intended to continue such general liability, it is difficult to see why the repeal of the statute of 1883 was not made absolute instead of qualified and limited. There is no reason why an abutter whose property is injured by a change of grade made in the interest of the general public, traveling either on the highway or on the railroad, should be less entitled to compensation than where such change is dictated solely by local considerations.

We now reach the position taken by the Appellate Division, that whatever may be the appellant's rights she is not entitled to enforce them by this proceeding. Having decided that the appellant's rights are secured by the act of 1883, which we hold is still extant, it follows that she is in any view entitled to maintain the proceedings authorized by that statute. As already said, the proceedings under the Village Law are substantially the same as those prescribed by the law of 1883. At least, the requirements of the former act are no greater

than those of the latter. It was not necessary for the petitioner to specify under what law she sought to proceed provided she complied with all the requisites of the statute on which her rights were founded. The learned court below thought that the provisions of section 63 of the Railroad Law, which enact that in case of the change of a grade crossing the municipality if unable to obtain the same by purchase shall acquire the lands, rights or easements necessary for the improvement by condemnation under the Condemnation Law, and that the railroad company shall have notice of such proceedings and the right to be heard therein, were exclusive and inconsistent with the right of the appellant to maintain this proceeding. We see no such inconsistency. All proceedings of this character, whether prescribed by the act of 1883, by the Village Law or by the Railroad Law, are to be taken under the Condemnation Law, the only difference that I perceive being that the Railroad Law contemplates the company or municipality as being the moving party, while the act of 1883 and the Village Law casts the burden of instituting the proceedings on the abutter who asserts that he has been damaged. There is no difficulty, however, in the harmonious and concurrent working of both statutes. In the proceeding before us, as the damage for which the appellant seeks to recover was occasioned by an improvement toward the expense of which the railroad company is required to contribute its ratable proportion, that company is entitled to be made a party thereto and to be heard therein as provided by the Railroad Law. Thus the rights of all parties can be secured. But the general rule is that where a right not existing at common law is given by a statute, and a remedy for the enforcement of that right prescribed, the right can be enforced only through the statutory remedy. (*Dudley v. Mayhew*, 3 N. Y. 9; *Heiser v. Mayor, etc., of N. Y.*, 104 N. Y. 68.) We should, therefore, be loath to hold, unless the language of the statute plainly requires such a result, that in any particular case the remedy prescribed by the act fails when as a result of such a ruling the right might fail also. Nor do we perceive the dif-

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ference between the rule of damages that obtains in proceedings under the Railroad Law and that which obtains under the act of 1883 and the Village Law which is suggested by the Appellate Division. It is true that the latter statutes provide in express terms for setting off benefits against injuries. But this is the rule under the Railroad Law so far as compensation is sought for consequential injuries. It was so held in the elevated railroad cases. (*Bohm v. Metr. E. R. Co.*, 129 N. Y. 576.) The right secured to an abutter to compensation for a change in the grade of a street is substantially the grant to him of an easement in the street to have it maintained at its existing grade, and any such easement created by the statute is in every respect analogous to those invaded in the elevated railroad cases.

The order of the Appellate Division so far as it dismissed the appellant's petition should be reversed and the proceedings remitted to the Special Term with directions to the appellant to make the Erie Railroad Company a party thereto, with costs to the appellant at the Appellate Division and in this court.

O'BRIEN, BARTLETT, MARTIN, VANN and WERNER, JJ., concur; PARKER, Ch. J., not voting.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
FRANK WHITE, Appellant.

1. MURDER—SUFFICIENCY OF EVIDENCE. The evidence upon the trial of an indictment for murder reviewed and held sufficient to sustain a verdict convicting the defendant of the crime of murder in the first degree.

2. APPEAL—BRIEFS OF COUNSEL SHOULD CONTAIN A FAIR STATEMENT OF FACTS. A fair statement of the facts is essential to a proper presentation of an appeal. An unfair statement is certain to be discovered and when discovered affects the force of the entire brief. When the facts are not open to review they should be stated as found, or as presumed to have been found. When the facts are to be reviewed it is proper for counsel to state them as he claims they should have been found in accordance with

the weight of evidence, citing the folios where the evidence appears in the record, but on the crucial points he should also state the testimony opposed to his theory, so that the court may have before it a faithful picture of the whole case. A failure to observe these rules increases the labor of the court and reflects upon the integrity of the brief.

3. EVIDENCE — ADMISSIBILITY OF CONFESSION PROCURED BY DECEPTION — CODE CR. PRO. § 395 — CREDIBILITY OF WITNESS THERETO A QUESTION FOR THE JURY. Confessions made by one accused of crime may be given in evidence unless made upon a stipulation for freedom from prosecution or under the influence of fear produced by threats. (Code Cr. Pro. § 395.) The fact, therefore, that a confession was procured from a defendant charged with the crime of murder by a deception practiced by an officer in charge of him, which is not sanctioned by the Court of Appeals, does not make it incompetent. Confessions must be corroborated by proof "that the crime charged has been committed," and when so corroborated, the question of the credibility of the witnesses thereto and the circumstances under which the confessions are made are for the consideration of the jury.

4. HOW COMPETENCY OF CONFESSION IS TO BE DETERMINED. The competency of a confession is to be determined by the trial court upon the facts in evidence at the time it is offered, and in all cases inquiry should be made whether the defendant spoke through fear or in the expectation of immunity, and when he is under arrest it should also be asked whether he spoke to the magistrate, or to the officer in charge, or in their presence, because he felt that he was compelled to for any reason, and it is proper to allow a preliminary examination by the defendant's counsel to test the competency of a confession before it is received. After it is received, if a question of fact arises as to its voluntary character, the jury should be instructed to wholly disregard it, unless they find that it was voluntarily made, without threat or menace by acts, words or situation, and without compulsion, real or apprehended, and without the promise, express or implied, that the defendant should not be prosecuted or that he should be punished less severely.

5. TRIAL — INSTRUCTION TO JURY. Where a confession procured from a defendant, who was imprisoned under a charge of murder, by an undersheriff pretending to be his friend and desiring to help him, and other confessions made to fellow-prisoners who were in the charge of the sheriff and subject to his influence, are offered in evidence and it appears that there is evidence to bring all of the confessions within the permission of the statute (Code Cr. Pro. § 395), but none to bring any of them within the prohibition thereof, except the statement of the defendant himself, which was denied by several witnesses, and the confessions are corroborated, one in nearly every particular and the others in several substantial particulars, it is not erroneous to submit to the jury the question of fact whether any of the confessions fell within the prohibition of the statute or of the rules of evidence, where they are instructed to disregard them if they were made

under the influence of fear produced by actual or covert threats, or through promises, acts of intimidation or other unlawful means, and unless they were voluntary, fairly obtained and not procured by inquisitorial compulsion or other improper methods.

(Argued October 12, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for Oswego county December 16, 1901, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

L. W. Baker and *Frederick G. Spencer* for appellant. The jury had no right to convict the defendant upon his alleged confessions alone. (*People v. Pullerson*, 139 N. Y. 339.) The prosecution must prove beyond a reasonable doubt and by affirmative evidence every element which constitutes the crime of murder in the first degree. (*People v. Corey*, 157 N. Y. 332; *People v. Fish*, 125 N. Y. 136.) The methods used by the sheriff and under-sheriff to extort from the defendant alleged confessions and statements as to the location of the place where the revolver and pocket book were hid were against public policy, and should be condemned by the courts. (*People v. Kennedy*, 159 N. Y. 346.)

Udelle Bartlett for respondent. The jury's verdict should not be disturbed because it is amply supported by the evidence. (*People v. Cignarale*, 110 N. Y. 23; *People v. Taylor*, 138 N. Y. 405; *People v. Stone*, 117 N. Y. 483; *People v. Tice*, 131 N. Y. 654; *People v. Lippy*, 128 N. Y. 630; *People v. Wayman*, 126 N. Y. 586; *People v. Kelly*, 113 N. Y. 647; *People v. Trezza*, 125 N. Y. 740; *People v. Fish*, 125 N. Y. 144.) Defendant's confessions were amply corroborated. (*People v. Deacons*, 109 N. Y. 377; *People v. Jashne*, 103 N. Y. 199.) The efforts of the sheriff's officers to detect and bring to punishment the murderer of George Clare were proper. (*Cox v. People*, 80 N. Y. 515; *People v. McCallam*,

103 N. Y. 598; *People v. Druse*, 103 N. Y. 656; *People v. McGloin*, 91 N. Y. 249; *People v. Deacons*, 109 N. Y. 377.) The trial court submitted to the jury all questions as to whether defendant's statements and confessions were voluntarily and freely made by him and not induced by fear and also the question of a deliberate and premeditated design as questions of fact. (*People v. Johnson*, 139 N. Y. 361; *People v. Bishop*, 69 Hun, 105; *People v. Cassidy*, 39 N. Y. S. R. 28; 133 N. Y. 612.)

VANN, J. The homicide which gave rise to this appeal occurred on Sunday, the 15th of September, 1901. At about half-past three in the afternoon of that day the body of George Clare, the deceased, was found in a potato patch upon his farm, situated about four miles east of the city of Oswego. The potato patch was an uninclosed part of a large field, eighty rods east of the farmhouse in which Mr. Clare had resided with his family for several years. There were four bullet wounds in the body, one on the radial side of the left forearm, commencing half-way between the elbow and wrist and ending just above the outer part of the wrist joint, where the bullet was extracted.

The second was under the left arm and over the fifth rib, the bullet having glanced and entered the breast, where it was found about three inches from the point of entry.

The third bullet entered at the outer angle of the left eyebrow and lodged behind the eye. It did not penetrate the brain, but crushed the orbital arch and caused some congestion through concussion.

The fourth entered "partly on the back, or between the back and the side," cut some slivers from the tenth rib, glanced upward just over the surface of the liver, wounded the lower end of the right lung, passed through the left ventricle of the heart and was found in the front part of the body at the left border of the breast bone.

Neither the first nor second wound was serious; the third would not necessarily have been fatal, although it might have

resulted in death from inflammation after a few days, but the fourth, in the opinion of the physician who made the autopsy, caused instant death. The bullets were such as are in common use in revolvers known as number 32 in calibre and there was no indication from powder marks on the clothing, or otherwise, that they were fired at very close range.

From twenty to twenty-five feet northeast of the body the hat of the deceased was found, and about thirty feet southeast of that point the vines had been pulled from a hill of potatoes and were lying near it, while there were four or five potatoes on top of the hill. A few days later an axe, somewhat concealed by the grass and weeds, which were thick and high, was picked up a few feet from the potato hill. No pocket-book or money or weapon of any kind was found upon the body or near it and no tracks were observed.

The deceased was a well-to-do farmer about 52 years of age, who had owned the farm upon which he resided for a good while. His family consisted of his wife, who was about fifteen years younger than himself, William and Russell, grown-up sons by his first marriage, Pearl a young daughter of Mrs. Clare by her first husband, and the defendant, who had been the "hired man," working on the farm for six weeks. His name is Frank White, but he was there known only as Harry Howard.

During the afternoon before the tragedy all the children went away to spend the Sabbath, and did not return until Sunday night. The defendant also was away the night before, having driven to Oswego with Mr. and Mrs. Clare, but while they returned home he remained in the city until the next morning. Upon their arrival at Oswego the defendant asked the deceased for two dollars on account of his wages, when Mr. Clare went with him to a store, took out his pocket book, got a bill changed and handed him the amount asked for. At that time Mr. Clare had a ten-dollar bill, a five-dollar bill and some smaller bills left, and the defendant had an opportunity to see that he had money in his possession. The next morning Mr. Clare took his pocket book from his

pocket to give his wife an account for work that some one had done for him, and she observed, as she testified, that he then had a five-dollar bill and a ten-dollar bill besides some silver. After giving her the statement he put his pocket book in the right-hand pocket of his trousers, and he had the same trousers on when he was found dead in the afternoon.

Four or five days before his death Mr. Clare came into the house with the defendant, who is a colored man, but nearly white, and said to Mrs. Clare, according to her evidence, "Our man is going to leave us and you had better watch him and see that he doesn't take anything that doesn't belong to him." The defendant promptly answered, "Mr. Clare, you don't think I would take anything that didn't belong to me, do you," when Mr. Clare said to him, "I never saw a nigger yet that wasn't a thief," and during the conversation charged him with stealing things from the house and called him a thief two or three times. The defendant denied the charge as often as it was made.

When the defendant was in Oswego the night before the homicide he told a young lady that Mrs. Clare was a very nice woman, but he thought Mr. Clare was mean to her, and added, "It wouldn't be well for him to be mean to her when I am around."

The defendant at this time was about twenty years of age and had lived in the county of Oswego for six years. Of a low grade of intelligence he did not know his own age or the number of his brothers and sisters, or other facts of like character. In the spring of 1901, a few months before the homicide, he was discharged from the jail of Oswego county where he had been confined for a year, during the first six months upon a sentence for assault and battery, and the rest of the time because he failed to give bail to keep the peace. He was arrested soon after he entered the Clare homestead at about eleven o'clock Sunday night. He was first handcuffed and then searched and among the articles found upon him were fifty-five cents in money, a half-pint bottle, one-third full of gin, some powder for the face, a finger ring belonging to

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Mrs. Clare, which she said was usually kept on a stand in her bedroom, but which had disappeared three days before, and a revolver cartridge of 32-calibre, so embedded in the corner of his right coat pocket as to be somewhat concealed. When the ring was produced he said he found it in the yard, but on the trial he swore that Mrs. Clare had given it to him. When the cartridge was found he said, apparently with indignation, that some one had put it in his pocket while the search was in progress, but the sheriff and his officers swore that this was not so. In response to questions put by the arresting officer and others he declared that he had been in Oswego all day, and that he took his breakfast and dinner there at Cordingly's Hotel. When asked soon after by the coroner if he had a revolver, he replied that he never had owned or carried one. He also said at different times and in the presence of several persons that he had not been on the Clare farm that Sunday until he came back late at night, but had spent the day at Oswego, except as he went off for a swim, and that he had taken breakfast, dinner and supper at Cordingly's Hotel. On the way to jail he told the sheriff he had arrested the wrong party, and that he ought to have taken Mrs. Clare. He insisted that he was innocent.

On the trial two witnesses testified that about a week before the homicide the defendant, while at a livery stable in Oswego, took a package of tobacco from his pocket, and, in doing so, pulled out a revolver. When asked why he carried it, he said he was held up on the road once and should run no more chances. A pawnbroker of Oswego testified that two or three weeks before Mr. Clare was killed the defendant showed him a small revolver, 32 in calibre, with a pearl handle. It was loaded, and he was told to put it back in his pocket.

The clerk of the Cordingly Hotel testified that the defendant spent Saturday night there, and the next morning paid for his lodging, but that he did not take breakfast or dinner that day, which was the Sunday in question. The defendant, however, returned to the hotel at about five o'clock in the

afternoon and asked if he could have supper, but was told that it would not be ready until an hour later. The girl who waited on the table at the hotel swore that he took neither breakfast nor dinner there, but did have supper at about six o'clock. There was other evidence to the same effect.

Many witnesses testified that in the neighborhood of twelve o'clock on the day of the homicide they saw the defendant going east toward the Clare farm and some of them conversed with him. He was also seen by several witnesses going from the direction of the Clare farm west toward Oswego about three o'clock in the afternoon. Two witnesses saw him come out of an orchard into the highway and start east toward the farm, which was about one mile away. After they were out of sight he was seen by other witnesses to turn around and walk west toward Oswego. From the orchard to the farm a person going across through the woods would be substantially concealed from observation. The defendant was not seen by any witness within less than a mile of the Clare farm on the day in question, until his return late at night.

The sheriff of the county, who kept the jail, testified that the next night after his arrest the defendant asked him what he had heard and the sheriff said: "We hear enough; you told us last night coming home you didn't have a revolver and weren't out at the Clare's, to-day we locate you with a revolver; it looks bad for you; if we don't get that gun that you shot this man with its going hard with you." The defendant replied: "I never shot the man." The conversation then continued: Q. "Who did shoot this man?" A. "Mrs. Clare." Q. "Where did she shoot him?" A. "In the potato field." Q. "Where were you?" The defendant hesitated and then said, "I stood in the lane about forty rods off." The sheriff said, "Frank, if Mrs. Clare shot this man we have got to have that revolver; we want to convict her. You can tell us where we can find it, so that we can go and get it." The defendant replied, "I will go to-night." The sheriff said, "You can tell us so that we can go just as well," and thereupon the defendant said that he hid the revolver by a

beech tree in the first piece of woods beyond a big corn field. The next afternoon the sheriff took some heavy clothes to the defendant, which he had asked for, and said, "Frank, how came you in that lane?" The defendant answered that he had a date there with this woman. The sheriff said, "Then you made this up between you," and the defendant replied, "Yes, but she shot him before I got there; he was pulling up a hill of potatoes when she plugged it into him." He then refused to talk further, saying that the sheriff was paid for getting evidence against him.

The next day the sheriff and under-sheriff took the defendant in a hack to the Clare farm and on reaching a certain point, he got out and, handcuffed to one of the officers, led them across lots about eighty rods to a beech tree, pointed toward the roots and said, "You look in there and you will get the gun." A revolver was found at the place indicated, concealed under a covering of leaves and dirt three inches thick, and when it was taken out, the defendant said, "That's the gun." The revolver was of 32-calibre with a pearl handle and in it were two empty shells and two loaded cartridges.

After this the defendant did not talk with the sheriff any more, but the under-sheriff wormed himself into his confidence by making him believe he was his friend and wished to help him, and thus by gross deception, but without threats, persuaded him to make further disclosures. On one occasion the sheriff sent for the defendant's shoes, and, when he asked for the reason, the under-sheriff said it was for use in reference to tracks. The defendant then said: "Darn those shoes. I ought to have got it fixed. One of them was worn right through on the ball."

Five days after the revolver was found the under-sheriff said to the defendant, "Things look a little dark; I would like that pocket book or something to work on." The defendant immediately asked, "What kind of a scheme would it be to get that pocket book, get it into Mrs. Clare's room, in her bed or somewhere, where it might be found?" The officer

replied, "Perhaps a good one," and the defendant said, "Supposing we do that?" and was told, "Very well, but where is the pocket book? Can you go and tell us where it is?" and the defendant said he would. The sheriff and under-sheriff at once took him to the Clare farm again and stopped at the point where he directed. Although it was after dark, he led them to a stump not far from the tree where the revolver had been found, and said, "Look in there and you will find the pocket book." A pocket book was found under some dirt and leaves beneath the stump. There were some papers but no money in it, and it was identified as the one which Mr. Clare was in the habit of carrying.

After this the defendant, believing that the under-sheriff was his friend, talked freely with him, and on one occasion told him that he returned to the farm from Oswego, going through a ravine, some woods and a big corn field, and entered the back door of the barn, where he saw Mr. Clare. He told him the cows were in the potatoes, and Mr. Clare went to the house, but came out at once, and they walked along together and drove out the cows. They returned through the potato patch, and while there he said to Mr. Clare: "I wonder how the potatoes are?" Mr. Clare laid down the axe which he had taken in order to repair the fence, stooped over and commenced to dig potatoes with his hands, and as the defendant continued, "I fixed him there." He was asked, "Did you shoot him," and he answered, "Twice. I came back through the big corn field into the woods, hid the pocket book, hid the gun, went through the ravine out into the Hall road and back to Oswego City."

The defendant made separate statements to three fellow-prisoners, according to their testimony, while in jail at Oswego. Frank Cavanaugh, who was confined for petit larceny and had been convicted before for selling whiskey without a license and attempting to break jail, testified that the defendant asked him to tell the sheriff that he shot Mr. Clare that Sunday afternoon, and that Mrs. Clare told him to. He added that he thought this would get him off with a sentence

for life. To George Le Clair, who was awaiting trial for stealing a horse, he said that after going across lots he entered the barn on the Clare farm, and seeing Mr. Clare, told him the cows were in the potatoes and corn. Mr. Clare said they would go down and drive them out, but before starting he went to the house for a short time. They then drove the cows out, fixed the fence and while crossing the potato field had an argument in relation to the defendant's wages. The defendant finally said to Mr. Clare, "You son of a bitch, your days are numbered right here," and pulling out a revolver, shot him in the left side and he started to run and "hollered." When about seven feet away he turned round to see if the defendant was coming after him and was shot over the eye, but did not fall. Clare started toward the defendant, put his hands up to defend himself, when the defendant shot the third time and hit him in the arm. Clare then got pretty close to him, and the defendant did not want to get blood on himself, so he sprang to one side, shot again and stayed there until Mr. Clare was dead. He then put his hand into the pockets of the deceased, took out a pocket book and backed away, covering his tracks until he reached a stone wall, when he walked down the wall to the end, jumped off into a heap of brush, got on the grass, walked over to a piece of woods and buried the pocket book, after he had taken \$15 out of it. He took three empty shells out of the revolver, put in a good one, hid it under the roots of a tree and left for Oswego. The same witness testified that after this, and but two days before the trial began, he had another talk with the defendant, who asked him to tell the district attorney that he was in the barn drunk; that Mrs. Clare knew he was there and brought him whisky; that she unbuttoned the bosom of her dress, pulled out a pocket book and told him to take the pocket book and revolver and go hide them or she would shoot him. The witness further testified that the defendant told him that if he would say this to the district attorney and swear to it, and he swore to it himself, he would get off with a life sentence.

Harvey Halsted testified that he had been convicted of

petit larceny three times, but claimed that on one occasion he was innocent. He swore that in November, after the homicide, the defendant told him that he was in the barn with Mr. Clare, who went to the house for something but came back, and they both went to the lot to put out the cows. They got into a little dispute; the defendant said to Clare, "Your days are numbered here," pulled out the gun and shot him in the left side. Mr. Clare whirled and he shot him in the arm and over the eye, and then Clare started to run and he shot him in the back, stayed over him until he was dead, took his pocket book, backed away, brushing out his tracks as he went, got on the stone wall, walked until he came to a grass lot, jumped off into a brush heap and from there went off and planted the gun and pocket book. He found between twelve and fifteen dollars in the pocket book. He also said in the same conversation that at this time Mrs. Clare was over in the corn lot a little way from the potato patch, so that if he did not make sure of her husband she would; that she had a gun in her stocking-leg and he saw the prints of it when she was running for the house from the corn lot.

Mrs. Clare testified that on Sunday morning her husband started to carry the milk to the factory at about twenty minutes of nine, looking at the clock just before and saying he was late. He returned in about two hours, and shortly before Homer Spencer, a neighboring farmer, came in. Upon the return of Mr. Clare he went with Mr. Spencer to the barn and about one o'clock Mr. Clare came back to the house alone, stayed a few minutes and returned to the barn. Five minutes later he came to the house, remained for a minute and went out toward the barn. This was about half-past one or twenty minutes of two, and Mrs. Clare never saw her husband again alive. She was getting dinner at the time, and soon after, seeing two young ladies known as the Sheldon girls, whom she knew well, driving by, she went out and hailed them and invited them in to dinner. They objected at first, but upon her urgent and repeated solicitations, finally hitched their horse and went into the house. Mrs. Clare finished her

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preparation for dinner, waited a half-hour after the meal was ready, went out on the porch and called her husband, but he did not come and then the three sat down to the table. Just as she finished her dinner, but before the Sheldon girls were through and at about a quarter of three, Spencer returned. Twenty minutes later the girls left when Mrs. Clare and Spencer went to the barn, passed through it, went down a lane to a pair of bars and at that point she saw a cow in the farther corner of the field where the potato patch was. She told Spencer to go over there and look for Mr. Clare, and if he did not find him to call Mr. Hall who was cutting corn in an adjoining field. Spencer went over toward the cow, and in doing so passed through the potato patch, where he saw the body of Mr. Clare lying, face downward, between the rows. He called Mrs. Clare and Mr. Hall, and both came. No one touched the body, as it was understood that this would not be lawful, until the coroner arrived. Mrs. Clare did not go up close to the body of her husband, but, standing off a little distance, wept and asked Mr. Hall to examine and see if he was dead. Mr. Hall did so without touching the body, and pronounced him dead. No blood was observed at this time. They then went for help, and notified the coroner. Mrs. Clare had a policy of insurance upon the life of her husband for \$1,000, which was promptly paid. Mr. Clare owned two farms and left no will.

Spencer, Hall and the Sheldon girls testified to the same story in substance, so far as their observation extended, but with some variations. Both of the girls observed that Mrs. Clare put the meat that was left after dinner back on the stove to keep it warm. Mr. Hall heard shots during the day, as he did every Sunday at that time of year, but none in quick succession or from the direction of the potato patch. He was working all day in the field until called over to see the body, except while he was at dinner between one and two o'clock. He thought that he resumed work about a quarter of two and that it was from one to two hours later when he was hailed by Spencer. The rustling of the corn stalks made

some noise which might have affected his ability to hear and the farther end of the rows of corn was quite a distance from the potato patch. Two neighbors, father and son, swore that Spencer was at their house from about half-past twelve until two or half-past. Some of these witnesses were called by the prosecution and others by the defense.

The defendant, sworn as a witness in his own behalf, testified that Mr. Clare gave him two dollars on Saturday night and that he had about seventy-five cents or a dollar besides. He spent the night at Cordingly's Hotel and had breakfast in the dining room, being waited upon by the regular waitress whom he identified as a witness sworn for the People. After going about town a little while he went over to Black creek to go in swimming. This was a mile or more from the Clare farm and, after dressing, he went through the woods and entered the back door of the barn. On his way he saw a man cutting corn in Mr. Hall's corn field. He went through the barn to the front door, when Mrs. Clare came where he was and said, "Hello, Harry," and he replied, "Hello, Mrs. Clare. Where is Mr. Clare?" She answered, "I don't know," when he said, "I have a note for him." She asked, "What about," and then pulled him over to the side of the barn, took out a pocket book and revolver and poked them into his right coat pocket. He asked her what that was for and she said that Mr. Clare and she went down into the corn field and drove out the cows. After fixing the fence they went over into the potato lot and he started to pull up some vines when she shot at him twice. The defendant asked her what for, and she said that she and Mr. Clare had an argument together. The defendant asked her what she put the things in his pocket for, and she told him to go over somewhere back in the woods and hide them. He said he would like some dinner first, but she told him to go back to the city after he hid the things and not to come back until night, because she had company and didn't want him around there. He then hid the revolver and pocket book, one by a stump and the other at the side of a beech tree; started for Oswego, and reached there at about half-past four or five

o'clock. He took supper at six, walked around town awhile, procured a bottle of gin and returned to the Clare farm, reaching the house between eleven and twelve o'clock. Soon after he was arrested, handcuffed and searched. When the cartridge was found he denied, with some warmth, that he ever put it in his pocket, and said that the arresting officer or somebody else had put it in. He declared that he found the ring in the yard, took it to Mrs. Clare, who gave it to him, saying that he had been a good boy, but asking him not to wear it when Mr. Clare could see it on him. He admitted that he owned a revolver, which he bought two or three months before, with a box of cartridges, but said that he left it with the cartridges in his stand drawer when he went to Oswego, Saturday night. He testified that he was dosed with whisky in the jail until he told where the revolver and pocket book were. He admitted that he went with the officers and pointed out the places where the articles were hid, but insisted that he was drunk at the time. He denied absolutely making the statements to Cavanaugh, Le Clair and Halsted as sworn to by them. He said that he did not open the pocket book, but observed three shells in the revolver just before he buried it. He was not positive that the revolver in evidence was his, but said that it was just like the one he had. He denied substantially, but not all, the statements that the sheriff and under-sheriff testified he had made to them, and swore that before he told where the revolver was, the under-sheriff said he wanted it to put in Mrs. Clare's bed.

The defendant's testimony at the critical point, where he stated what took place between Mrs. Clare and himself in relation to hiding the revolver and pocket book, was given with great hesitation, and seven different times he was urged, by court or counsel, to "go on."

Mrs. Clare, when recalled, denied the story told by the defendant about the revolver and pocket book and swore that she did not see him during the day. She also denied that she had given him the ring. There was evidence tending to show that the construction of the barn was such as to make it

impossible for her to pull him over to the north, as he testified. Two witnesses swore that he said he did not see Mrs. Clare that day. Six witnesses testified that no whisky was ever given to prisoners in the jail, and the three officers in charge said that none was at any time given to the defendant.

There was much more evidence, but, having stated the salient points, we are compelled to omit the rest in order to restrict our opinion to reasonable limits. It is obvious that, independent of the alleged confessions, there was a case for the jury. Four shots were fired in succession, and the last bullet, which caused immediate death, entered the back part of Mr. Clare's body, apparently when he was trying to escape. This warrants the inference that the fatal shot was fired with the deliberate and premeditated design to effect death, and characterized the crime as murder in the first degree. (*People v. Ferraro*, 161 N. Y. 365; *People v. Majone*, 91 N. Y. 212.)

There was some evidence of motive, inadequate to be sure, but, as we have said, while the motive to murder can never be adequate, it may be obvious. The criminal records of this court show that even a smaller sum of money than Mr. Clare is supposed to have had upon his person when he was killed has been the sole inducement to the gravest of crimes. Our records also show that insulting words, recently uttered, sometimes inflame the mind and lead to murder for the purpose of revenge.

The defendant had the means and the opportunity of perpetrating the crime. The revolver used was his own, and he admits that he was at the Clare farm at about the time of the murder. He hid the pocket book and the revolver. While the money was not found upon him, and he was not shown to have spent it, still it appeared that he was in Oswego for four or five hours during the evening after the homicide, and that he there had an opportunity to dispose of it.

The statements of a person made when he is first charged with a crime have some bearing upon the question of his guilt. (*People v. Conroy*, 97 N. Y. 62, 80.) They are by no means conclusive, and undue weight should not be given

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them, for innocent men sometimes lie in order to divert suspicion from themselves. When the defendant was arrested he denied that he had a revolver, or that he was at the Clare farm during the day of the homicide, and insisted that he took dinner at Cordingly's Hotel, but these, with other statements, were not only shown to be false, but he admitted they were false, when on the witness stand. He, himself, pointed out the places where he had hidden the revolver and the pocket book and told how he approached the Clare farm in the shelter of the forest. He neither denied nor explained why, when he came out of the orchard and saw the carriage, he at first walked back toward the farm and after the carriage was out of sight, turned around and went on toward Oswego.

His effort to fasten the crime upon Mrs. Clare has little support in the evidence, aside from his own testimony and his conflicting statements threw doubt upon his final story. His hesitation at a suggestive point in his testimony may have been owing to the excitement caused by his situation, or to the natural difficulty of describing that which never happened. It was for the jury, who saw and heard him testify, to decide whether he spoke the truth. The evidence against him was so strong that it would have been strange if they had accepted his account with no substantial corroboration.

No exception was argued by the learned counsel for the defendant, whose brief would have been of greater aid to the court if it had stated the facts fairly and had cited the folios where the evidence to support his statements could be found. A fair statement of the facts is essential to a proper presentation of an appeal. An unfair statement is certain to be discovered, and when discovered affects the force of the entire brief. When the facts are not open to review they should be stated as found, or as presumed to have been found. When the facts are to be reviewed it is proper for counsel to state them as he claims they should have been found in accordance with the weight of evidence, citing the folios where the evidence appears in the record, but on the crucial points he should also state the testimony opposed to his theory, so that

impossible for her to pull him over to the care of the whole
fied. Two witnesses swore that he ^{increases} the labor of
Clare that day. Six witnesses test: ^{of the brief.}
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independent of the al ^{consideration, because those made to}
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bullet, which caus ^{of the witnesses, but because those}
of Mr. Clare's b ^{of the character of the sheriff and subject to his}
This warrants ^{character-}
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v. Ferro ^{by statute that the confession of a defendant}
The ^{may be given in evidence against him unless it was made upon}

but, ^{a stipulation for freedom from prosecution, or under the influ-}
ade ^{ence of fear produced by threats. It is not, however, suf-}
ce ^{icient to warrant a conviction, without additional proof that}

^{the crime has been committed. (Code Crim. Proc. § 395.)}
There was evidence to bring all the confessions within the
permission of the statute, but none to bring any of them
within the prohibition thereof, except the statement of the
defendant, himself, which was denied by several witnesses.
It is clear from the facts already stated that the con-
fessions were corroborated, one in nearly every particular
and the others in several substantial particulars. The
statute does not require corroboration in every respect, in
order to authorize a conviction upon confessions, but only
in the single particular, "that the crime charged has been
committed." (*People v. Deacons*, 109 N. Y. 374, 377;
People v. Jaehne, 103 N. Y. 182, 199.) While we do not
sanction the deception practiced by one of the officers in
charge of the defendant, the court could not exclude the con-
fessions made to him on that account. Deception was used in
order to induce the defendant to tell the truth. No induce-
ment was held out to him to confess guilt unless there was

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The confession to the under-sheriff was made to him, a public officer, but as a supposed friend. It is not sufficient to require a confession by a prisoner, as we have held, that it was made under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put to him, or that it was made under the hope or promise of some benefit of a collateral nature." (*Cox v. People*, 80 N. Y. 500, 515.) Confessions induced by the use of decoy letters, by the false assertion that some of the accomplices of the prisoner were in custody, or made to a detective disguised as a confederate, or upon the promise that they will not be disclosed, have been received in evidence with the sanction of courts of high authority. (*Campbell v. Commonwealth*, 84 Pa. St. 187; *Commonwealth v. Knapp*, 9 Pick. 496; *Commonwealth v. Tuckerman*, 10 Gray, 173; *State v. McKean*, 36 Iowa, 343; *State v. Foretner*, 43 Iowa, 494.)

Cautious and hesitating as courts have always been in regard to confessions made by a person when under arrest to those in authority over him, they have not gone so far as to exclude them, simply because they were procured by deception, provided they were voluntarily made. (*People v. Wentz*, 37 N. Y. 303.) They are careful, however, to leave the credibility of the witness who practiced the deception and the circumstances under which the confessions were made to the consideration of the jury. The test is whether the prisoner had any inducement to tell a falsehood against himself, or felt compelled to speak for any reason when he preferred to remain silent. (*Balbo v. People*, 80 N. Y. 484, 499; *Murphy v. People*, 63 N. Y. 590; *Commonwealth v. Knapp*, *supra*; Wharton Criminal Ev. [9th ed.] § 658.)

In all cases inquiry should be made whether the defendant spoke through fear, or in the expectation of immunity, and when he is under arrest it should also be asked whether he spoke to the magistrate, or to the officer in charge, or in their presence, because he felt that he was compelled to for any reason. The competency of a confession is to be determined by the trial court upon the facts in evidence at the time it is

offered. It is proper, and such was the course pursued in this case, to allow a preliminary examination by the defendant's counsel to test its competency before it is received. After it is received, if a question of fact arises as to its voluntary character, the jury should be instructed to wholly disregard it, unless they find that it was voluntarily made, without threat or menace by acts, words or situation, and without compulsion, real or apprehended, and without the promise, express or implied, that the defendant should not be prosecuted, or that he should be punished less severely.

The question of fact whether any of the confessions fell within the prohibition of the statute or of the rules of evidence was submitted to the jury and they were instructed to disregard them if they were made under the influence of fear produced by actual or covert threats, or through promises, acts of intimidation or other unlawful means and unless they were voluntary, fairly obtained and not procured by inquisitorial compulsion or other improper methods. The defendant cannot justly complain of the course thus pursued by the trial judge, which was authorized by a recent decision of this court. (*People v. Cassidy*, 133 N. Y. 612, 613.)

The confessions, made separately to the three prisoners, were competent, and the credibility of the witnesses was for the jury. There is no evidence that any of these witnesses was under the influence of threats or hope or that the defendant's statements to them were not wholly voluntary. While the confessions differ in some substantial particulars, they agree in others of the utmost importance. The situation and condition of the body, the location of the stone wall, hat, axe and potato hill with the potatoes lying on top, the fact that the cows were out and that an axe was needed to fix the fence and other facts proved beyond doubt, are of peculiar significance when considered in connection with the confessions.

The charge of the court was impartial, clear and comprehensive. At its close the counsel for the defendant stated that they had no exception to it and nothing but commendation for it. The record is free from reversible error. The

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verdict was not against the weight of evidence nor against law, and justice does not require a new trial.

The judgment should, therefore, be affirmed.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur.

Judgment of conviction affirmed. .

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ALBERT J. ADAMS, Appellant.

1. CONSTITUTIONAL LAW — PERSONAL RIGHTS. Articles 4 and 5 of the amendments to the Constitution of the United States relating to personal rights do not apply to actions in the courts of the state of New York.

2. EVIDENCE — ADMISSIBILITY ON CRIMINAL TRIAL OF PRIVATE PAPERS ALLEGED TO HAVE BEEN UNLAWFULLY OBTAINED. The court when engaged in the trial of a criminal case will not take notice of the manner in which witnesses have possessed themselves of private papers or other articles of personal property, which are material and are properly offered in evidence.

3. SAME — WHEN ADMISSION OF PRIVATE PAPERS NOT VIOLATIVE OF CONSTITUTIONAL GUARANTY AGAINST COMPELLING PRISONER TO BE A WITNESS AGAINST HIMSELF — CONST. ART. 1, § 6. The admission in evidence upon the trial of an indictment under section 344a of the Penal Code, relating to policy playing, of private papers and property belonging to the defendant, alleged to have been unlawfully seized by police officers and introduced by the prosecution for the purpose of establishing his handwriting on certain policy slips, and to show that the office in which they were found was occupied by him, does not compel him to become a witness against himself in violation of section 6 of article 1 of the Constitution of the state of New York.

4. CRIMES — POLICY GAMBLING — CONSTITUTIONALITY OF SECTIONS 344A AND 344B OF PENAL CODE — WHAT PUBLIC OFFICERS MAY LAWFULLY BE IN POSSESSION OF APPARATUS USED IN GAME OF POLICY. Section 344a of the Penal Code, creating the crime of "policy" gambling and making it unlawful for any person to have in his possession the apparatus therefor, is not an unauthorized interference with the ownership of private property and is constitutional. Section 344b, making the possession by any person other than a public officer of such apparatus "presumptive evidence of possession thereof knowingly and in violation of" the preceding section, creates no offense, but simply prescribes a rule of evidence within the power of the Legislature, and is also constitutional. Neither section

depends upon the other, each being complete in itself. The public officers intended to be excepted by the Legislature are those who, in the discharge of their official duties, are necessarily at times the custodians of the apparatus, and this provision, therefore, is not objectionable as class legislation.

5. CONSTITUTIONALITY OF INDETERMINATE SENTENCE LAW — PENAL CODE, § 687A. Section 687a of the Penal Code, fixing a maximum and minimum sentence for prisoners, must be considered in connection with the law relating to prisons, permitting the parole of such prisoners, is a merciful exercise of legislative power and is constitutional.

6. EVIDENCE — NON-EXISTENCE OF SEARCH WARRANT IMMATERIAL. The refusal of the trial court to allow evidence as to the non-existence of a search warrant at the time of the removal of apparatus from the place claimed to have been occupied by the defendant as an office is not error, such apparatus being competent evidence and the manner of obtaining possession of it being immaterial.

People v. Adams, 85 App. Div. 390, affirmed.

(Argued October 16, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 13, 1903, which affirmed a judgment of a Trial Term entered upon a verdict convicting the defendant of the crime of knowingly having possession of a writing, paper and document representing and being a record of a chance, share and interest in numbers sold in a gambling game commonly called "policy," and of knowingly having possession of papers and devices such as are commonly used in carrying on and playing the game called "policy," in violation of section 344a of the Penal Code.

The sections of the Penal Code, under which conviction was had, read as follows:

"§ 344a. A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies,' or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy,' or for any writing, paper or document in the nature of a bet, wager or insurance upon the

drawing or drawn numbers of any public or private lottery ; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called ' policy,' or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery ; or any paper, print, writing, numbers, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called ' policy ' ; or who is the owner, agent, superintendent, janitor, or caretaker of any place, building, or room where policy playing or the sale of what are commonly called ' lottery policies ' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts or matters herein named, is a common gambler, and punishable by imprisonment for not more than two years, and in the discretion of the court, by a fine not exceeding one thousand dollars, or both."

"§ 344b. The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, in what is commonly called ' policy,' or in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers or device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called ' policy,' is presumptive evidence of possession thereof knowingly and in violation of the provisions of section three hundred and forty-four-a."

The facts, so far as material, are stated in the opinion.

L. Laflin Kellogg and *Alfred C. Petté* for appellant. By the reception in evidence of the defendant's private papers seized in the raid of December 12, 1901, which had no relation whatsoever to the game of policy, the defendant's

constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures was violated, and he was also thereby compelled to be a witness against himself in contravention of the fourth, fifth and fourteenth articles of amendment to the Constitution of the United States, and article 1, section 6, of the Constitution of the state of New York, and section 11 of the Bill of Rights of this state. (*Boyd v. U. S.*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547; *Matter of Jackson*, 96 U. S. 727; *U. S. v. Wong Quong Wong*, 94 Fed. Rep. 832; *Hoover v. McChesney*, 81 Fed. Rep. 472; *Matter of Pacific Railway Commission*, 32 Fed. Rep. 241; *Lester v. People*, 150 Ill. 408; *Newbury v. Carpenter*, 107 Mich. 567; *State v. Davis*, 108 Mo. 666; *State v. S. H. Co.*, 109 Mo. 118.) The statutes, sections 344a and 344b, under which the indictment was found and the conviction was had, are unconstitutional and void in that thereby the defendant has been deprived of his liberty and property "without due process of law" in violation of both the Federal and the State Constitutions. (*U. S. v. Willberger*, 5 Wheat. 76; *Colon v. Lisk*, 153 N. Y. 188; Cooley on Const. Lim. [6th ed.] 481-483; *People v. Lyon*, 27 Hun, 180; *State v. Kartz*, 13 R. I. 528; *Cancemi v. People*, 10 N. Y. 128; *Maurer v. People*, 43 N. Y. 1; *Messner v. People*, 45 N. Y. 1; *People v. Bradner*, 107 N. Y. 1; *Hopt v. Utah*, 110 U. S. 574; *Matter of Langslow*, 167 N. Y. 314.) The statute under which the defendant was sentenced to imprisonment for a term, the minimum of which shall not be less than one year and the maximum of which shall be not more than one year and nine months, is unconstitutional. (*People ex rel. v. Warden, etc.*, 39 Misc. Rep. 113; *People ex rel. v. Fox*, 77 App. Div. 245.)

William Travers Jerome, District Attorney (Howard S. Gans of counsel), for respondent. Even if it be assumed that some of the papers introduced in evidence were illegally taken from the possession of the defendant on the raid of December 12, 1901, the introduction of those papers in evi-

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dence would constitute no ground of error. (*People v. Gardner*, 144 N. Y. 119; *People v. Van Wormer*, 175 N. Y. 188; 1 Greenl. on Ev. § 245a; *Gindrat v. People*, 138 Ill. 103; *Comm. v. Tibbitts*, 157 Mass. 519; *State v. Van Tassel*, 103 Iowa, 6; *Chastany v. State*, 83 Ala. 29; *Starchman v. State*, 62 Ark. 538; *State v. Flynn*, 36 N. H. 64; *Shields v. State*, 104 Ala. 35.) Section 344a of the Penal Code, under which the defendant has been convicted, is constitutional. (*Phelps v. Racey*, 60 N. Y. 10; *People v. B. F. Co.*, 164 N. Y. 93.) Section 344b of the Penal Code is constitutional. (*People v. Cannon*, 139 N. Y. 32; Cooley on Const. Lim. 367-369; *State v. Cunningham*, 25 Conn. 195; *Wooten v. Florida*, 1 L. R. A. 819; *Comm. v. Williams*, 6 Gray, 1; *State v. Hurley*, 54 Me. 562; *State v. Higgins*, 13 R. I. 330; *State v. Mellor*, 13 R. I. 666, 669; *Comm. v. Kelley*, 10 Cush. 69; *Comm. v. Tuttle*, 12 Cush. 502; *Meadowcroft v. People*, 163 Ill. 56.) The indeterminate sentence law is constitutional. (*People ex rel. v. Fox*, 77 App. Div. 245; *State ex rel. v. Peters*, 43 Ohio St. 629; *People ex rel. v. State Reformatory*, 148 Ill. 413; *George v. People*, 167 Ill. 447; *Miller v. State*, 149 Ind. 607; *Comm. v. Brown*, 167 Mass. 144; *Oliver v. Brown*, 169 Mass. 592; *Murphy v. Comm.*, 172 Mass. 592; *Dreyer v. Illinois*, 187 U. S. 71.)

BARTLETT, J. As this is a unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain the verdict of the jury, it is only necessary to consider the facts sufficiently to determine the questions of law presented by this appeal.

It appears that the defendant occupied an office in the city of New York, wherein was his desk, trunk, tin boxes, and other articles of personal property. On a certain occasion when the defendant was in his office, the officers of the law appeared and stated that they had a search warrant. The defendant replied, in substance, before they proceeded to execute the same, that it was not his office and that they would proceed at their peril. The officers thereupon placed the

defendant under arrest and searched the premises. A large amount of papers was seized, which may be divided into two classes: (1) The papers referred to in the section of the Penal Code under which this indictment was found; (2) and papers relating to the private affairs of defendant.

The evidence discloses in detail the manner of conducting the gambling game known as "policy," from which it appears that certain papers are sent to a central point from different offices or places in the city where the game is conducted, known as "manifold sheets." Among the papers seized in defendant's office were thirty-five hundred of these "manifold sheets," upon some of which were indorsements and entries in his handwriting. At the trial these "manifold sheets" were introduced in evidence as papers described in section 344a of the Penal Code.

The private papers of the defendant were introduced in evidence for the double purpose of furnishing standards of his handwriting, and also tending to prove that the office, in which the papers relating to the game of policy were found, was occupied by him. There were also other books and papers put in evidence, in the handwriting of the defendant, relating to the entries on the "manifold sheets," that need not be more particularly described.

The first point made by the learned counsel for the appellant is that, by reason of the seizure of defendant's papers, as in the manner described, the defendant's constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures, was violated, and he was also thereby compelled to be a witness against himself in contravention of the fourth, fifth and fourteenth articles of the amendments to the Constitution of the United States, and article 1, section 6, of the Constitution of the state of New York, and section 11 of the Bill of Rights of this state.

Articles fourth and fifth of the amendments to the Constitution of the United States do not apply to actions in the state courts.

This first point, as stated, involves two distinct propositions

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that must be separated in considering them. The first is an alleged violation of the Bill of Rights, which protects a citizen against unreasonable searches and seizures, and the other is an alleged violation of the Constitution by compelling a person in a criminal case to be a witness against himself.

There were two classes of papers seized at the time the search warrant was executed. The legality of the seizure of the papers described in the section of the Penal Code, under which the indictment was found, cannot be successfully challenged; it, therefore, remains to consider the effect of seizing the private papers of the defendant.

In *Greenleaf on Evidence* (Vol. 1, § 245a) the learned author says: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they were offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it frame issues to determine that question."

In *Commonwealth v. Tibbetts* (157 Mass. 519) it was held as follows: "Evidence which is pertinent to the issue is admissible although it may have been procured in an irregular or even an illegal manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent. (*Commonwealth v. Dana*, 2 Met. 329, 337; *Commonwealth v. Lottery Tickets*, 5 Cush. 369, 374; *Commonwealth v. Intoxicating Liquors*, 4 Allen, 593, 600; *Commonwealth v. Welsh*, 110 Mass. 359; *Commonwealth v. Taylor*, 132 Mass. 261; *Commonwealth v. Keenan*, 148 Mass. 470; *Commonwealth v. Ryan*, 157 Mass. 403; 1 *Greenleaf's Evidence*, §§ 254a and 229; 1 *Taylor's Evidence*, § 922; 1 *Bishop's Crim. Proc.* [3rd ed.] § 246.)"

In this state the same principle has been recognized in

Ruloff v. People (45 N. Y. 213), and a kindred principle in *People v. Van Wormer* (175 N. Y. 188, 195).

The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence.

In the case before us, if there has been any illegal invasion of the rights of this defendant, by reason of alleged unlawful searches and seizures of private papers, his remedy is in an independent proceeding not necessary to be considered at this time. We do not wish to be understood as expressing an opinion in regard to the seizure of defendant's private papers. When the officers entered the defendant's office he assured them he did not occupy it and that they would proceed at their peril. It is beyond dispute that the question as to who occupied the office was most material in connecting the defendant with the "manifold sheets" and other papers seized relating to the game of policy, and that the private papers were important in this connection. The same may be said as to the standards of defendant's handwriting.

The next question is whether this defendant was compelled to be a witness against himself in violation of the Constitution of this state. (Art. 1, § 6.)

The appellant's counsel places great reliance upon the case of *Boyd v. United States* (116 U. S. 616), holding that an act of Congress which authorizes a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney be taken as confessed, was unconstitutional, being repugnant to the fourth and fifth articles of the amendments to the Constitution of the United States.

Article IV deals with searches and seizures and article V contains language identical with our State Constitution, already quoted, to the effect that no person "shall be compelled in any criminal case to be a witness against himself."

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In the case at bar, the defendant was not sworn as a witness, nor was he required to produce any books or papers. So far as this case is concerned, as already pointed out, the manner in which the witnesses for the People became possessed of the documentary evidence is a matter of no importance. We are of the opinion, therefore, that the defendant was not, in any legal sense, called upon to be a witness against himself in this criminal proceeding.

The next point argued by the appellant's counsel is, that sections 344a and 344b of the Penal Code, under which the indictment was found and the conviction had, are unconstitutional and void, for the reason that the defendant has been deprived of his liberty and property without due process of law, in violation of both the Federal and State Constitutions.

We have here presented two distinct questions. We are unable to agree with the contention of appellant's counsel that these sections are to be read together. Section 344a creates the crime of which the defendant stands convicted; it is complete in itself and is in no way dependent upon the provisions of section 344b. The latter section establishes a rule of evidence only.

As to the alleged unconstitutionality of section 344a of the Penal Code. By article 1, section 9, of the Constitution of this state, it is provided as follows: "nor shall any lottery or the sale of lottery tickets, poolselling, bookmaking, or any other kind of gambling, hereafter be authorized by law within this state."

Section 336 of the Penal Code provides: "It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at any of the following places;" etc.

Section 344a immediately follows a section of the Penal Code dealing with keeping betting and gambling establishments, and is an amplification of the law looking to the suppression of gambling, it being aimed at the game of "policy,"

so called, which offered an opportunity to the poorer classes of making trifling bets and who could ill afford to lose their small earnings.

The papers referred to in section 344a are to be regarded the same as the tools of a burglar or the general gambling apparatus which are dealt with in the Penal Code.

The legislature, in addition to its ample general powers in dealing with the crime of gambling, has the sanction of the Constitution of the state.

The legislature, in order to protect game, has made it an offense for a person to have in his possession game birds of the kind specified after a certain date. (*Phelps v. Racey*, 60 N. Y. 10, 14.) This court said in the case last cited: "The legislature may pass many laws, the effect of which may be to impair or even destroy the right of property. Private interests must yield to the public advantage. All legislative powers, not restrained by express or implied provisions of the Constitution, may be exercised. * * * The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body." (See, also, *People v. Buffalo Fish Co.*, 164 N. Y. 93.)

We have in the game laws a more extreme exercise of the legislative power to interfere with the ownership of property for the public good than is disclosed in the section under consideration.

We are of the opinion that this section is constitutional.

Section 344b provides that the possession by any person, other than a public officer, of certain papers used in carrying on, promoting or playing the game commonly called "policy," is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a.

The learned trial judge, in charging the jury, called their attention to this statute, and explained its application and limitations. To this charge no exception was taken, and the question of the constitutionality of this section, therefore, is

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not presented.. In *People v. Spiegel* (143 N. Y. 107, 113) it was held that a party may waive the benefit of even a constitutional provision.

As this is a question of public importance, we will disregard the alleged waiver and consider the merits.

As already stated, this section creates no offense, but prescribes a rule of evidence, subject to certain limitations.

In *People v. Cannon* (139 N. Y. 32, 42, 43) this court said "It is said the legislature can create and define a crime, but it cannot declare what shall be *prima facie* evidence of its commission. Whether the crime as defined by the legislature has been committed by the accused is a question for the court and jury, and it is claimed that no direction to the court or jury as to what shall be considered *prima facie* proof can be given by the legislature. * * * The legislature of this state possesses the whole legislative power of the People except so far as such power may be limited by our Constitution. (*Bank of Chenango v. Brown*, 26 N. Y. 467.) The power to enact such a provision as that under discussion is founded upon the jurisdiction of the legislature over rules of evidence both in civil and criminal cases. This court has lately had the question before it. (*Board of Commrs. of Excise v. Merchant*, 103 N. Y. 143.) * * * It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the legislature may, with some limitations, enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question." This principle has been approved in a number of states.

The legislature, in the section under consideration, has gone a step further and provided that the possession by any person, other than a public officer, of the various papers and writings used in carrying on, promoting or playing the game commonly called "policy," is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a. In other words, the legislature has cast the burden of proof upon the person who has in his possession these incriminating

papers. The fullest opportunity is afforded him to rebut this statutory presumption. The exercise of this power is clearly within constitutional limitations and calculated to aid the People in prosecuting persons engaged in this form of gambling.

The appellant, in discussing this section, raises the additional point that it is class legislation, for the reason that it excepts from its provisions public officers.

It is argued that a notary public is a public officer, and that he might be knowingly in possession of these papers used in the game of policy with impunity.

It is true, if we give a literal construction to the language of this section, that the statement is warranted; but the rule is that all statutes must be reasonably construed, and in this case it is obvious that the legislature intended to except those public officers, who, in the discharge of their official duties, were necessarily, at times, the custodians of these papers. The section under consideration is clearly constitutional.

The appellant makes the further point, that the statute under which the defendant was sentenced to imprisonment for a term, the minimum of which shall be not less than one year, and the maximum shall be not more than one year and nine months, is unconstitutional.

Section 687a of the Penal Code was enacted in 1901, presumably in the interest of defendants who had never before been convicted of a felony. The fixing of a maximum and minimum sentence is to be considered in connection with the law relating to prisons. (§§ 74 to 83, Birdseye's R. S. [3d ed.] vol. 2, pp. 2737, 2738, 2739.) In brief it is provided (§ 77) that the superintendent of state prisons shall cause to be kept a record of each prisoner therein confined upon an indeterminate sentence; and if it shall appear (§ 78) to the board of commissioners of paroled prisoners that there is a reasonable probability that such prisoner will live and remain at liberty without violating the law, the board is permitted to release him on parole after service of the minimum sentence; but until the expiration of the maximum term he is not

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absolutely discharged, and is liable to rearrest if he violates his parole. This is a merciful exercise of legislative power which has been repeatedly approved by the Supreme Court. This form of legislation has been sustained by the courts of many other states.

The provisions to which attention has already been called, relating to the release of paroled prisoners, remove some of the objections urged by the appellant. The legislation complained of is constitutional and in the interest of the defendant who stands before the court charged with a first offense.

The appellant in his final point argues that the court erred to the prejudice of the defendant in refusing to allow evidence as to the non-existence of a search warrant at the time the papers were removed from the office of defendant.

We have already pointed out that the court will not take notice of the allegation that the possession of the papers offered in evidence on a criminal trial has been unlawfully acquired.

It follows that the questions asked of the witness Cuff were immaterial. The fact that an officer, engaged in the search of defendant's office for papers, testified that there was a search warrant does not vary the situation.

The judgment of conviction and the order appealed from should be affirmed.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment of conviction and order affirmed.

JAMES BUCKHOUT, Appellant, v. THE CITY OF NEW YORK,
Respondent.

TAX — NEW YORK CITY — EFFECT OF ASSESSMENT MADE WHILE PROCEEDING FOR CONDEMNATION OF PROPERTY BY CITY IS PENDING — TAX NOT A LIEN, WHEN TITLE PASSED TO CITY BEFORE CONFIRMATION OF ASSESSMENT ROLL. Where the report of commissioners in condemnation proceedings instituted by the city of New York to acquire certain real estate for municipal purposes, which awarded a certain sum to the owner thereof "for land and improvements," was confirmed by the court on

December 23, 1897, and the title to the property was taken thereunder by the city on July 6, 1897, the owner is not liable for the taxes levied on the property under an assessment roll in which the property was listed and valued as of the second Monday of January, 1897, where the assessment roll was not acted upon and confirmed by the municipal authorities until August 24, 1897, one month and sixteen days after the title had passed from the owner to the city; the tax never became a lien upon the land, since when the assessment valuation was made condemnation proceedings were in progress, and by due course of procedure the city became the owner of the property more than six weeks before the assessment was completed, and a tax, whether imposed upon property or upon the person of the owner on account of his ownership of the property, cannot be enforced if, before the tax becomes a lien, the city suspends its power of taxation by taking the property away from the owner through the power of eminent domain.

Buckhout v. City of New York, 82 App. Div. 218, reversed.

(Argued October 20, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered in favor of defendant April 29, 1903, upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

Charles L. Guy for appellant. An assessment, until confirmed, is not a tax, and, therefore, not legally chargeable as a debt. (*Coudert v. Huerstel*, 60 App. Div. 85; *Lathers v. Keogh*, 109 N. Y. 583; *Matter of Maresi*, 74 App. Div. 79.) Unconfirmed taxes cannot be considered by the commissioners in making their award. (*Matter of Mayor, etc.*, 40 App. Div. 281; *Matter of Riverside Park*, 59 App. Div. 603.) Condemnation proceedings are plenary in their nature, and the rights of property owners should be strictly guarded. (Cooley on Const. Law [3d ed.], 365; *Matter of Water Comrs. of Amsterdam*, 96 N. Y. 351; *Matter of R. El. Ry. Co.*, 123 N. Y. 351.)

George L. Rives, Corporation Counsel (*Theodore Connolly*, *James M. Ward* and *David Rumsey* of counsel), for respond-

ent. In the tax district comprising the city of New York, where property is lawfully assessed on the second Monday of January in any year, neither a change of ownership nor use after the books close will affect any liability lawfully attaching on the second Monday of January in any year. (*People ex rel. v. Coleman*, 126 N. Y. 433; *Rundell v. Lakey*, 40 N. Y. 516; *Matter of Babcock*, 115 N. Y. 458.) The plaintiff's liability to pay any tax to be extended against the assessment upon his property for the year 1897 became fixed on the second Monday of January in that year. (*McMahon v. Beekman*, 65 How. Pr. 427; *Assn. for Orphans v. Mayor, etc.*, 104 N. Y. 581; *Mygatt v. Washburn*, 15 N. Y. 316; *Sisters of Poor v. Mayor, etc.*, 51 Hun, 355; *Matter of A. F. A. Society*, 6 App. Div. 496.)

VANN, J. On the 6th of November, 1896, the proper authorities of the city of New York took the initial steps to acquire certain real property belonging to the plaintiff situate in said city. On the 22d of December, 1896, commissioners of estimate and assessment were appointed, and on the 19th of February, 1897, a resolution was adopted by the board of street opening and improvement, as authorized by statute, providing that title to said land should vest in the city on the 6th of July following. On the 23d of December, 1897, the report of the commissioners, made seven days before, was confirmed, whereby the plaintiff was awarded the sum of \$127,312.50 "for land and improvements." The improvements were worth about \$6,000.

On the second Monday of January, 1897, the plaintiff, then a resident of the city of New York, was "assessed upon the said property by name as its owner for purposes of local taxation for the year 1897." No application was made by the plaintiff to correct the assessment, and on the 24th of August, 1897, the local taxes for that year were duly confirmed and the amount extended opposite the description of the plaintiff's land was the sum of \$945. On the 15th of January, 1898, the whole amount of said award was paid over to the plaintiff,

but only upon the condition required by the comptroller that he should deposit his certified check for the sum of \$1,100, as security for the payment of said taxes, provided it should be held that they were chargeable against him. It was understood that the check should be retained by the comptroller until the determination of the question whether the unconfirmed taxes of 1897, standing against the property at the time title thereto vested in the city of New York, "should properly be deducted from the amount of said check," which has not been cashed but is held by the comptroller to await the result of this action. Upon the submission of the controversy, the plaintiff demanded judgment for the sum of \$1,100, or the return to him by the defendant of his check for that amount, while the defendant demanded judgment for the amount of said taxes for the year 1897. The Appellate Division, by a divided vote, overruled the contention of the plaintiff and ordered judgment in favor of the defendant for the amount of said taxes. From the judgment entered accordingly the plaintiff appealed to this court.

The award is presumed to cover the value of the land at the time when title passed to the city, but the owner is also entitled, "in addition to the value of" the property at that date, "to the amount of all taxes and assessments levied or imposed upon the property" after that date, "which shall have been actually paid by the owner." (*Matter of Mayor, etc., of N. Y.*, 167 N. Y. 627, 628.) If, however, after the passing of title, the owner remains in possession and receives an income from the property, it is to be deducted from or applied upon the taxes so paid. (*Matter of Mayor, etc., of N. Y.*, *supra*; *Matter of Board of Education of N. Y.*, 169 N. Y. 456, 459.) It does not appear and cannot be presumed that the plaintiff had the use of the land after the title vested in the city, and hence, if he had paid the tax in question, according to the authorities cited, he would have been entitled to receive the amount thereof in addition to the value of the property at the time of appropriation. (*Id.*)

When *Matter of Mayor, etc., of N. Y.* (*supra*), sometimes

cited as *Matter of Riverside Park*, was before the Appellate Division, Mr. Justice PATTERSON, who wrote for that court, said, "We conceive the proper rule in this case to be that interest and taxes are to be added to the award, but, as an offset, a deduction may be made of rentals actually received by the owner, or where rentals have not been received, of the value of the use and occupation of the premises from the date of the appropriation of the property to the time of the award. As these subjects of deduction are in the nature of offsets, we are of the opinion that the burden is upon the city to show what amounts should be allowed by way of deduction." (59 App. Div. 603, 606.) When that case came to us certain questions were certified for decision, and among them the following: "In a proceeding to ascertain the compensation which shall be paid to the owners or persons interested in real property, the title to which is acquired under chapter 152 of the Laws of 1894, are the owners of such real property entitled, in addition to the value of said real property on the date of the passage of said act, to the amount of all taxes and assessments levied or imposed upon the property sought to be acquired after the passage of the act and which shall have been actually paid by said owners?"

We affirmed the order appealed from, answered the question certified in the affirmative and adopted Justice PATTERSON's opinion. While that case arose under a different statute from that under which the plaintiff's land was condemned, the provisions of both are the same in substance so far as the vesting of title, the award and the effect thereof are concerned.

The court below sought to distinguish that case from the one under consideration on the ground that in the former the award was of a fixed sum "subject to the lien of all unpaid taxes, assessments and water rates," while it does not appear that the award in this case contained any statement upon the subject of unpaid taxes. The statement of facts upon which the controversy now before us was submitted simply says that the plaintiff was awarded "the sum of \$127,312.50 for land and improvements," and it cannot be presumed, under all the

circumstances, that the commissioners took into account or included in the award the tax in question.

According to the statute in force when the tax was in form assessed, real property in the city of New York was listed and valued as of the second Monday in January, and from that date until the first of May valuations thus made could be corrected, but after that date the books were closed to enable assessment rolls to be prepared for delivery to the municipal assembly on the first Monday of July. (City charter, L. 1897, ch. 378, §§ 889, 892, 895, 907.) The assessment rolls were perfected by the action of the municipal assembly, which fixed the amount of the tax upon each piece of property, and on or before the first of September the completed rolls were delivered, with the proper warrants attached, to the receiver of taxes, who was thereupon required to collect the amounts as extended in a column opposite the valuations. (Id. §§ 909, 910.) The municipal assembly did not finally act upon the rolls in question until the 24th of August, which was one month and sixteen days after title to the land formerly belonging to the plaintiff had passed from him to the city. The taxes never became a lien upon the land, which on the 6th of July was transferred by the act of the defendant from the status of assessable property to that of property exempt from taxation because it was owned by the city. When the valuation was made condemnation proceedings were in progress, and by due course of procedure the city became the owner of the property more than six weeks before the assessment was completed. Condemnation is, in substance, a compulsory sale and so far as its effect upon concurrent taxation is concerned, may properly be treated the same as if the sale had been voluntary. If the plaintiff had voluntarily conveyed his land to the defendant on the 6th of July, 1897, the city would have taken the same title as an ordinary grantee, and even a covenant by the plaintiff in the deed that the premises were free and clear from all incumbrances would not have enabled the city to compel him to pay the tax. (*Lathers v. Keogh*, 109 N. Y. 583; *Dowdney v. Mayor, etc., of N. Y.*, 54 N. Y. 186.) As

was said by Judge GRAY in the case first above cited : " Until the amount of the tax is ascertained and determined, no lien or incumbrance exists by reason thereof, and we think that the proper construction of this covenant (against incumbrances) merely calls for the freedom of the property, at the time of the conveyance, from what can be considered an incumbrance upon the property ; not freedom from some undetermined matter which may ripen into a charge, imposed as a lien by law, but freedom from a visible and ascertained incumbrance."

Whether, as a general rule, a completed tax creates a debt against the owner, as a primary liability with a lien on the land as security or not, we think that in this case the passing of title to the city exercising the taxing power before the assessment ripened into a lien, destroyed the basis and consideration for the tax, and prevented the enforcement thereof either as a personal liability or a lien. A tax, whether imposed upon property or upon the person of the owner on account of his ownership of the property, cannot be enforced if, before the tax becomes a lien, the city suspends its power of taxation by taking the property away from the owner through the power of eminent domain. The city cannot tax and condemn at the same time. The exercise of the power of condemnation, when completed, excludes the power of taxation, so far as the property taken is concerned. After the sixth of July, 1897, when the city took the property as its own, it could not lawfully fix the amount of the tax or extend it to the column opposite the valuation, or take any step to convert the assessment or valuation previously made into a complete tax, definite in amount and capable of enforcement. Taxation cannot create a debt until there is a tax fixed in amount and perfected in all respects. It is not enough to lay the foundation, but the structure must be built. There cannot be a complete tax laid upon real estate until it is so perfected as to become a lien, because until then the amount cannot be known. The rights of the owner and the city became fixed on the day when title vested in the latter, and unless at that time there was a tax which could be enforced as a debt without further action to

fix the amount, there never was, for after the city had taken the property by force and had it as its own, it could not, by proceedings on its part, create or perfect a personal liability against the owner on account of that property. A city cannot eat its cake and have it any more than a citizen. It cannot commence proceedings to tax, then take away the property, and after that complete the process of taxation. From the moment the plaintiff ceased to be the owner he was relieved of all the burdens of ownership. The power of taxation by the city ceased when the power of eminent domain destroyed private ownership and turned the property over to the city. It was the act of the city itself in condemning the property which brought about this result, for if the appropriation had been by a railroad company, it would have had no effect upon the right to mature and collect the tax.

Jurisdiction to assess in the city of New York on the first Monday of January ordinarily gives jurisdiction to complete the assessment regardless of transfers or changes of residence in the meantime. Grants of property voluntarily made, after it has been listed and valued, but before the tax is confirmed and completed, do not concern the city nor prevent it from taking the course of procedure prescribed by statute. Such were the facts in the cases chiefly relied upon by the respondent, which hold that ordinary changes of ownership do not affect subsequent action to complete the tax, but this was not an ordinary change, nor one for which the city had no responsibility. It is not a case of sale by one citizen to another citizen, which would not arrest action by the city to mature the tax, but of condemnation by the taxing power itself of the property of a citizen, which necessarily precludes further efforts by that power to finish and fasten a liability on the former owner because he once owned the property. By no act of his did he cease to be the owner, and by no act of the city, after it became the owner, can a personal liability be completed and enforced against him.

For these reasons we think that the judgment of the Appellate Division should be reversed and judgment rendered in

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favor of the plaintiff for the return to him by the defendant of his check for \$1,100, unpaid, or, in default thereof, for the amount of said check, with costs in both courts.

PARKER, Ch. J., HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., dissents on ground that it is to be presumed that the commissioners, in making their award at a time subsequent to the levying of the annual tax, took into consideration the amount of the plaintiff's indebtedness therefor.

Judgment reversed, etc.

FRANK J. MARTIN, Appellant, v. THE CITY OF NEW YORK,
Respondent.

NEW YORK CITY — PAYMENT TO DE FACTO CLERK IS A DEFENSE TO ACTION FOR SALARY BY DE JURE CLERK. When a clerk in the office of the board of aldermen of the city of New York, who had been removed and another appointed in his place, was reinstated by mandamus because he had been removed without "an opportunity to present an explanation in writing," the city is not liable to such clerk for the salary of the position in question during the period between the date of his removal and the date of his reinstatement, where during that interval the salary of the position was paid to another, who, by an appointment regular upon its face, held the position, performed the duties thereof and was paid the compensation attached thereto.

Martin v. City of New York, 82 App. Div. 35, affirmed.

(Argued October 21, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 30, 1903, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. S. Gilbert for appellant. As a regular clerk the plaintiff's relation to the city of New York was purely contractual. He was not a public officer. (*Steinson v. Bd. of Education*, 165 N. Y. 431; *Graham v. City of New York*, 167 N. Y.

85.) The rule that payment to a *de facto* officer, while holding the office and discharging its duties is a defense to an action brought by the *de jure* officer, has no application to the case at bar. (*People ex rel. v. Mayor, etc.*, 49 App. Div. 208; *Terhune v. Mayor, etc.*, 88 N. Y. 247; *Fitzsimons v. City of Brooklyn*, 102 N. Y. 536; *Steinson v. Bd. of Education*, 165 N. Y. 431; *Graham v. City of New York*, 167 N. Y. 85.)

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for respondent. The payment of the salary of an office to the *de facto* officer will defeat an action brought by the *de jure* officer to recover salary for the same period. (*Dolan v. Mayor, etc.*, 68 N. Y. 274; *McVeany v. Mayor, etc.*, 80 N. Y. 185; *Terhune v. Mayor, etc.*, 88 N. Y. 247; *Demarest v. Mayor, etc.*, 147 N. Y. 203; *Shaw v. Pima County*, 18 Pac. Rep. 273; *Gorman v. Boise County*, 1 Idaho, 655; *S. C. Comrs. v. Anderson*, 20 Kans. 298; *Michel v. New Orleans*, 32 La. Ann. 1094; *Wayne Co. Auditors v. Benoit*, 20 Mich. 176; *Parker v. Dakota Co. Suprs.*, 4 Minn. 59.) The rule referred to likewise applies to municipal employees. (*Higgins v. Mayor, etc.*, 131 N. Y. 128; *O'Hara v. City of New York*, 28 Misc. Rep. 258; 46 App. Div. 518; 167 N. Y. 567; *Van Valkenburgh v. Mayor, etc.*, 49 App. Div. 208.)

VANN, J. For several years prior to the first of October, 1900, the plaintiff was a clerk in the office of the clerk of the board of aldermen of the city of New York, but on that day he was removed and A. Joseph Porges was forthwith appointed in his place. Mr. Porges occupied the position, performed the duties and was paid the salary from the first of October, 1900, until the 24th of January, 1901, when the plaintiff was reinstated by mandamus because he had been removed without "an opportunity to present an explanation in writing." (*People ex rel. Martin v. Scully*, 56 App. Div. 302.)

The object of this action was to recover the salary attached

to the position during the period while it was paid to the wrongful incumbent. The foregoing facts having been admitted at the trial, the court directed a verdict in favor of the defendant, and after affirmance of the judgment by the Appellate Division, the plaintiff came here.

It is well settled in this state that "payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession," and that the remedy of the latter is by action against the former. (*Dolan v. Mayor, etc., of N. Y.*, 68 N. Y. 274, 280, 281; *Mc Veany v. Mayor, etc., of N. Y.*, 80 N. Y. 185; *Terhune v. Mayor, etc., of N. Y.*, 88 N. Y. 247; *Demarest v. Mayor, etc., of N. Y.*, 147 N. Y. 208.) These decisions rest upon the principle that the public cannot be compelled to pay twice for the same services, and that the officer charged with the duty of paying salaries is not required to go behind the commission or the certificate of election and, at his peril, decide difficult questions of fact or law, but may make payment to the person who occupies the office and performs its duties.

It is, however, insisted that the rule does not apply to this case, because the plaintiff was not a public officer but an employee holding a contractual relation to the city, and the following cases are relied upon to support the position: *Stein-son v. Board of Education of N. Y.* (165 N. Y. 431); *Graham v. City of New York* (167 N. Y. 85). There is an important distinction between the cases cited and the one in hand, because in neither of the former was the position filled and no one was paid for services rendered by a *de facto* occupant. The rule governing payments to a *de facto* officer is founded in public policy and applies with the same force to payments made to a *de facto* occupant of a position of public employment although not an officer. In deciding those cases, as is obvious from the opinions, we did not intend to disturb the rule laid down in *Higgins v. Mayor, etc., of N. Y.*, (131 N. Y. 128). In that case an honorably discharged soldier,

appointed by the mayor of the city of New York to a position as laborer at the fixed compensation of two dollars a day, was wrongfully discharged, another person was appointed in his place, and was paid by the city until the veteran was reinstated by legal proceedings. We held that he could not maintain an action to recover the stipulated wages for the period while the position was filled by the intruder, and that the city was not bound to make any compensation to him for the time he was not in actual service. *Terhune v. Mayor, etc. of N. Y.*, (*supra*), was followed, and the principle applicable to a *de facto* officer was applied to the *de facto* incumbent of the position then under consideration, because the reason for the rule which controlled the decision in the one case applied with equal force to the other.

We distinguish the case now before us from those relied upon by the appellant, and, following the *Higgins* case, hold that the defendant is not liable to the plaintiff for the salary of the position in question during the period between the date of his removal and the date of his reinstatement, because during that interval the salary of the position was paid to another, who, by an appointment regular upon its face, held the position, performed the duties thereof and was paid the compensation attached thereto.

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

THOMAS H. COLE et al., as Executors of CHRISTOPHER SWEZEY, Deceased, Respondents, v. MINNIE E. ANDREWS, as Administratrix of the Estate of FRANK E. SWEZEY, Deceased, Appellant.

INTEREST — MONEYS ADVANCED SUBJECT TO ELECTION OF EXECUTORS TO TREAT ADVANCEMENT AS A LOAN — INTEREST RUNS FROM TIME OF ELECTION. Under a written instrument executed by a son acknowledging that his father had furnished him a specified sum of money; that it was not a gift, but a debt due the father; that it might be collected after his father's

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decease by his legal representatives at their election by treating it as a loan and enforcing it, or as an advancement, deducting it from his share in the estate; when such sum is enforced as a loan, interest should be awarded from the day when the executors elected to treat it as such, and not from the time the money was advanced by the father.

Cole v. Andrews, 88 App. Div. 285, affirmed.

(Submitted October 30, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 29, 1903, modifying and affirming as modified a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

John A. Thompson and *W. W. Thompson* for appellant.

Edgar J. Phillips and *Frank M. Avery* for respondents.

PARKER, Ch. J. This action was brought by the executors of Christopher Swezey against the administratrix with the will annexed of his son, Frank E. Swezey, to recover moneys furnished to the latter by his father. Plaintiffs' claim rests on the following instrument:

"I, Frank E. Swezey, a son of Christopher Swezey, hereby acknowledge that at this date I am indebted to him in the sum of \$2,961 advanced to me by him between March 1, 1893, and November 14, 1893. I hereby agree that the same shall be charged against any portion of the estate of Christopher Swezey that may fall to me under any will that he may leave, and that the same may be and shall be charged as an advancement against such portion. I further agree that the same may be held as a debt due by me to the estate of said Christopher Swezey if the executors or administrators of said estate desire to treat the same as a debt, and the same may be offset against the share or portion so coming to me or otherwise in form so as to accomplish the charging of the same against

either the real or personal property which I may inherit from said Christopher Swezey."

This instrument contains four clauses :

I. "I, Frank E. Swezey, a son of Christopher Swezey, hereby acknowledge that at this date I am indebted to him in the sum of \$2,961 advanced to me by him between March 1, 1893, and November 14, 1893." This clause acknowledges the liability.

II. "I hereby agree that the same shall be charged against any portion of the estate of said Christopher Swezey that may fall to me under any will that he may leave, and that the same may be and shall be charged as an advancement against such portion." This authorizes the deduction of the sum, as an advancement from any part of the father's estate falling to the son under any will of the father.

III. "I further agree that the same may be held as a debt due by me to the estate of said Christopher Swezey if the executors or administrators of said estate desire to treat the the same as a debt." This clause authorizes the executors or administrators of the estate of the father, if they so elect, to treat such sum as a debt due the estate — a chose in action.

IV. "And the same may be offset against the share or portion so coming to me or otherwise in form so as to accomplish the charging of the same against either the real or personal property which I may inherit from said Christopher Swezey." This clause authorizes the charging of the said sum, as an advancement, against the son's share in the father's estate should the latter die intestate.

The instrument is an acknowledgment that the father has furnished a specified sum of money to the son ; that it is not a gift, but a debt due the father, and that it may be collected after the decease of the father by his legal representatives ; and, further, that the sum may be collected, at the election of those legal representatives, (1) by treating the sum furnished to the son as a loan, and enforcing it, or (2) by treating it as an advancement and deducting it from the son's share in the estate.

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Statement of case.

We think the Appellate Division was right in modifying the judgment by deducting the interest for the time prior to the day when the executors elected which remedy they would pursue.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

CHARLES MAAS, as Administrator of the Estate of FRIEDA MAAS, Deceased, Appellant, v. THE GERMAN SAVINGS BANK IN THE CITY OF NEW YORK, Respondent.

EXECUTORS AND ADMINISTRATORS—WHEN PAYMENT TO FOREIGN ADMINISTRATOR AFTER APPOINTMENT OF ADMINISTRATOR IN THIS STATE DISCHARGES DEBT. The payment by a savings bank in the city of New York of a deposit, made by a decedent who was a resident of another state, to an administrator appointed therein, is good and discharges the indebtedness, although several months prior thereto an administrator had been appointed in this state, when the payment is made in good faith and without actual notice of such appointment and it does not appear that the decedent had any creditors in this state; and the fact that the appointment was a matter of record in the surrogate's office is not sufficient to charge the bank with constructive notice thereof.

Maas v. German Savings Bank, 73 App. Div. 524, affirmed.

(Argued October 20, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 8, 1902, upon an order reversing a judgment of the Appellate Term of the Supreme Court, which affirmed a judgment of the General Term of the City Court of the city of New York affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Thomas F. Gilroy, Jr., for appellant. The title, or, at least, the right of possession to the balance of the deposit

was in the plaintiff, whether he be regarded as a subordinate or as a principal administrator. (Code Civ. Pro. §§ 2473, 2478, 2700, 2701; *Abbott v. Curran*, 98 N. Y. 665; *Banta v. Moore*, 15 N. J. Eq. 97; *Preston v. Lord Melville*, 8 Cl. & Fin. 1 [H. L. 1841]; *Apperson v. Bolton*, 29 Ark. 418; *Vaughn v. Northrup*, 15 Pet. 1; *Dorsay v. Connell*, 22 N. B. 564; *Crescent City Ice Co. v. Stafford*, 3 Woods [U. S.], 94; 13 Am. & Eng. Ency. of Law [2d ed.], 931, 932, and cases cited; *McIlvoy v. Alsop*, 45 Miss. 365; *Harvey v. Richards*, 1 Mason, 380.) The voluntary payment of the balance of the account by the defendant to the New Jersey administrator could not discharge the bank because of the previous appointment of the New York administrator. (*Stone v. Scripture*, 4 Lans. 186; *Chapman v. Fish*, 6 Hill, 554; *Pond v. Makepeace*, 2 Metc. 114; *E. L. Assur. Society v. Voegel*, 76 Ala. 441; *Reynolds v. McMullen*, 55 Mich. 568; *Parsons v. Lyman*, 20 N. Y. 103, 113; *Vroom v. Van Horne*, 10 Paige, 549, 557; *Vaughn v. Northrup*, 15 Pet. [U. S.] 1; *Vaughn v. Barrett*, 5 Vt. 333; *Young v. O'Neal*, 3 Sneed, 55.) The bank had constructive notice of plaintiff's rights, and having made the payment to the New Jersey administrator in the face of this constructive notice, it is chargeable as if negligent, and the payment is no bar to this action. (*Farmer v. M. S. Inst.*, 60 Hun, 462; *Mahon v. S. B. S. Inst.*, 175 N. Y. 69; *Podmore v. S. B. S. Bank*, 48 App. Div. 218; *Appelby v. E. C. S. Bank*, 62 N. Y. 12; *Ficken v. E. I. S. Bank*, 33 Misc. Rep. 92; *Harvey v. Richards*, 1 Mason, 421.)

Erwin I. Spink for respondent. A voluntary payment by a debtor to a foreign domiciliary administrator is a good payment and discharges the debt, unless it can be impeached for fraud or bad faith. (*Williams v. Storrs*, 6 Johns. Ch. 353; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Parsons v. Lyman*, 20 N. Y. 103; *Peterson v. Chemical Bank*, 32 N. Y. 21; *Matter of Butler*, 38 N. Y. 397; *Schluter v. B. S. Bank*, 117 N. Y. 125; *Wilkins v. Ellett*, 9 Wall. [U. S.] 740; 3

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Redf. on Wills, 26; *Stevens v. Gaylord*, 11 Mass. 256; Story on Conflict of Laws, §§ 515, 515a.) The domiciliary administrator had apparent authority and right to receive the money; he had the general legal title to all the assets of the decedent wherever they were situated; he had the pass book and a lawful certificate, and a payment to him, made in good faith, and with no notice of a claim by any other person, was a valid payment. (*Matter of Prout*, 128 N. Y. 70; *Bishop v. S. S. Bank*, 33 App. Div. 181; *Boone v. C. Sav. Bank*, 84 N. Y. 83.)

HAIGHT, J. Frieda Maas died at her residence in Guttenberg, Hudson county, state of New Jersey, on the 15th day of November, 1898, leaving her surviving a son and daughter, both minors and residents of the same place. On the 23rd day of August, 1899, the surrogate of Hudson county, New Jersey, issued letters of administration upon her estate to Frederick Maas, a brother of her deceased husband. After his appointment he presented a certified copy of his letters of administration to the defendant bank, together with her pass book, and demanded the payment to him of the amount which the decedent had upon deposit, and thereupon the bank paid over such balance to him. Prior thereto, and on the 9th day of March, 1899, the plaintiff Charles Maas, another brother of the decedent's deceased husband, applied and had issued to him letters of administration upon her estate by the surrogate of New York county in this state, and after the defendant bank had paid the amount on deposit with it to the administrator appointed in New Jersey, he served a notice of his appointment upon the defendant and demanded the payment to him of the amount of such deposit. The bank having refused, this action was brought to recover the amount thereof. Upon the trial the facts were agreed upon. It does not appear that the decedent had any creditors in this state, and it is conceded that the defendant bank in making its payment did so in good faith, without actual notice that letters of administration had been issued in this state. The question

thus presented is as to whether the plaintiff, under such circumstances, can recover.

The succession to, and the distribution of, the estate of an intestate is governed by the law of the domicile, and where an administrator has been appointed and has properly qualified in the state of the domicile, he is vested with power to receive payment of the debts owing to the intestate, and to take possession of the assets and give proper acquittances therefor, wherever the debtors or the holders of the assets may be, within or without the state. But where the debtor or the holder of the assets is in a foreign jurisdiction and the debts are not paid or the assets surrendered to the administrator of the place of the domicile of the decedent, the courts of the foreign jurisdiction will not enforce the redelivery of such debts or assets until the administrator has procured ancillary letters or a new administrator has been appointed under the laws of the place where the debts exist or the assets may be. (*Matter of Prout*, 128 N. Y. 70-74; *Parsons v. Lyman*, 20 N. Y. 103; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Matter of Estate of Butler*, 38 N. Y. 397; *Despard v. Churchill*, 53 N. Y. 192; *Matter of Hughes*, 95 N. Y. 55; *Vroom, Administratrix, v. Van Horne*, 10 Paige's Ch. 549; *Appeal of Gray, Jr.*, 116 Pa. St. 256-262; *Wilkins v. Ellett*, 9 Wall. 740; *Wilkins v. Ellett*, 108 U. S. 256; *Matter of Cape May & D. B. N. Co.*, 51 N. J. Law, 78-82; *Schluter v. Bowery Savings Bank*, 117 N. Y. 125.) In the latter case, EARL, J., in answering the claim that the administrator derived his authority from the state of New Jersey, and that a payment could not legally be made to him, says: "Payment to the personal representative is good, because at the death of the intestate he becomes entitled to all his personal property wherever situated, and having the legal title thereto he can demand payment of choses in action; and a payment to him made anywhere, in the absence of any conflicting claim existing at the time, is valid. It is true that if the defendant had declined payment the foreign administrator could not have brought action in this state to enforce it. But

a voluntary payment to such an administrator has always been held valid. Therefore, in receiving this payment Mr. Knittel was the representative of the deceased and able to give an effectual discharge to the defendant." In that case a will of the decedent was subsequently found and admitted to probate. It was, however, held that the letters of administration theretofore issued were not void, and, until they were revoked, persons dealing with the administrator in good faith were protected. It is thus apparent that the administrator of the domicile was vested with the power to collect all of the outstanding debts owing to the intestate, and that where payments were made to him in good faith the debt was discharged. So far all of the authorities appear to be in accord. This narrows the discussion to the question arising out of the fact that an administrator had been appointed in this state before the administrator of the domicile had applied for and obtained the deposit in the defendant bank.

Statutory provisions for the issuing of ancillary letters appear as early as the first revision of the statutes, and, with some changes, have been continued to the present time. The purpose of such letters was undoubtedly intended to aid foreign executors and administrators in the collection of claims against persons residing in this state, and to operate as a protection for home creditors. We consequently have provisions authorizing the surrogate to require security of administrators sufficient to protect creditors (Laws of 1863, chap. 403); and finally the surrogate is authorized by his decree on final accounting of administrators, after having fully protected the rights of the creditors within this state, to transmit the money and other personal property remaining of the decedent, to the state, territory or county where the principal letters were granted, to be disposed of pursuant to the laws of that state. (Code Civ. Pro., §§ 2700, 2701.)

It is thus apparent that the plaintiff upon receiving letters of administration in this state became entitled to the assets of his intestate, and had the right to collect from the defendant the amount she had on deposit in the bank at the time of her

decease. He, however, was required to act with reasonable dispatch. He could not be permitted to remain silent and suffer the administrator of the domicile to collect the debts and carry away the assets, without objection or the disclosing of his appointment as administrator in this state to the persons owing the debts or having the custody of the assets, and then recover from them. As we have seen, the plaintiff was appointed administrator in this state on the 9th day of March, 1899, and for five months and a half thereafter he remained idle, taking no steps to give notice to the defendant bank of his appointment, or to make any demand upon it to pay him the amount on deposit, until after the administrator of the domicile had called upon the bank for payment and received the amount due from it to the estate. We, consequently, conclude that the act of the bank, in making the payment to him in good faith without knowledge that another administrator had been appointed in this state, operated as a discharge of the indebtedness.

It is contended on behalf of the plaintiff that the defendant had constructive notice of the appointment of an administrator in this state, arising out of the fact that the appointment of the plaintiff was a matter of record in the surrogate's office. We, however, are not inclined to adopt this view. Such a rule would seriously interfere with the collection of debts, and would become exceedingly burdensome to debtors. It might be impossible for them to determine the counties in the state in which the decedent had personal property. It would, therefore, become necessary for them to examine the records of every surrogate's office in the state in order to determine whether an administrator had been appointed.

The judgment should be affirmed, and judgment absolute ordered for the defendant upon the stipulation, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, MARTIN and WERNER, JJ., concur; CULLEN, J., not voting.

Judgment accordingly.

MINNIE GRUBE, as Administratrix of JOHN GRUBE, Deceased,
Respondent, v. THE HAMBURG-AMERICAN STEAMSHIP COM-
PANY, Appellant.

NEGLIGENCE — COLLISION AT SEA — ERRONEOUS REFUSAL TO CHARGE. Upon the trial of an action against a steamship company for negligence resulting in the death of plaintiff's intestate, who was drowned as the result of a collision between a steamship and a pilot schooner on which he was employed, the defendant is entitled to have the jury instructed, in substance, that it was the duty of those navigating the schooner, when approaching another vessel, to have a "lookout" and keep a man at the wheel and not allow the schooner to drift before the wind, and a refusal to charge requests to that effect constitutes reversible error.

Grube v. Hamburg-American Packet Co., 88 App. Div. 636, reversed.

(Argued October 28, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Everett P. Wheeler for appellant. The requests to charge as to navigation rules express well-settled rules of law applicable to the case at bar, and the defendant was entitled to have them given. (*The Ariadne*, 13 Wall. 475; *The Sunnyside*, 91 U. S. 208; *Belden v. Chase*, 150 U. S. 674; *The Trave*, 55 Fed. Rep. 117; *The Catalonia*, 43 Fed. Rep. 396; *The City of New York*, 147 U. S. 72; *The Philadelphia*, 61 Fed. Rep. 862; *Jacobsen v. D. & N. Co.*, 114 Fed. Rep. 705; *The A. W. Thompson*, 39 Fed. Rep. 115; *The Illinois*, 103 U. S. 298.)

Gilbert D. Lamb for respondent. Defendant's exceptions to the charge of the court cannot be sustained. (*Groh v. Groh*, N. Y. L. J. Feb. 21, 1903; *McGinley v. Ins. Co.*, 77 N. Y. 495.)

WERNER, J. The Appellate Division has unanimously affirmed the judgment entered upon the verdict for the plaintiff herein. Upon the record presented to us we deem it necessary to discuss only a single question, and that is raised upon the refusal of the trial court to charge two requests which we think defendant's counsel was entitled to have submitted to the jury. A brief statement of the material facts will disclose the relevancy and importance of these requests. The action is one for damages for alleged negligence which resulted in the death of plaintiff's intestate. On the 17th day of August, 1901, the steamer *Alene*, owned by the defendant, and the pilot schooner *James Gordon Bennett*, owned by a New Jersey corporation, collided in the vicinity of Scotland lightship in the harbor of New York, with the result that the schooner went to the bottom and carried several of her crew with her. Among those who perished was plaintiff's intestate. One of the questions litigated was that of jurisdiction, which depended upon conflicting evidence, and which, upon the record before us, the unanimous affirmance below has concededly and conclusively resolved in favor of the plaintiff. Another contested question was that of defendant's alleged negligence, and this in turn depended, in some degree, upon the existence or absence of negligence in the sailing of the schooner, in the wreck of which plaintiff's intestate lost his life. Defendant contended, and introduced evidence tending to prove, that at the time of the collision there was no one at the wheel of the schooner, and that she had no "lookout." This was controverted by evidence tending to show that all hands were on deck of the schooner with the exception of four pilots and the steward, the plaintiff's intestate.

As it is conceded that plaintiff's intestate was free from contributory negligence, the trial court correctly charged that concurring negligence in the navigation of both vessels would not defeat plaintiff's right to recover, because if that were the fact, she could bring her action against either or both of the guilty parties. But, on the other hand, it is obvious, even

upon the rather nebulous state of the record with reference to the relative positions of the vessels just before the collision, that the question of defendant's negligence depended somewhat upon the degree of care exercised in the navigation of the schooner. It was, therefore, important that any request bearing directly upon that subject should have been explicitly charged.

The requests referred to were as follows: "4. When the schooner had changed her course and headed to the westward it was Captain Mix's duty to keep a man at the wheel and not allow her to drift before the wind."

"5. It was also his duty to keep a lookout after the schooner had changed her course and was headed to the westward."

Upon these requests the court charged: "It is the claim of the defendant that at the time of the accident there was no one at the wheel of the schooner and that there was no lookout. It is for you to say, in the light of all the evidence, just what the facts are, and if you find them to be as claimed by the defendant, it is still for you to say whether those omissions, if they were omissions, contributed to the happening of the accident."

We are inclined to the view that this charge did not fairly and fully cover the requests, and that the defendant was entitled to have a charge substantially in the language of the requests. While, as we have said, negligence on the part of those in charge of the schooner would not necessarily absolve those in command of the steamer from the charge of negligence, yet the questions of separate and concurring negligence were so interdependent that the rules of law pertaining to these questions, above all others, should have been clearly and precisely stated to the jury. As an abstract proposition it goes without saying that the duties of wheelman and lookout upon vessels navigating the high seas are of the highest importance, and in cases of collision their conduct is always the subject of minute scrutiny. As applied to the case at bar, the effect of the alleged absence of two such important func-

tionaries in the management of the schooner presented, of course, a question for the jury, but the defendant had the right to a proper charge upon that subject.

It would undoubtedly be going too far to say that the refusal of the court to charge as requested was clearly controlling of the verdict found, and yet it would not be going far enough to arbitrarily assume that it had no effect whatever. Therefore, we think the refusal to charge as requested was error for which the judgment herein should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and CULLEN, JJ., concur; MARTIN, J., not voting.

Judgment reversed, etc.

In the Matter of the Application of JOHN A. GARVER, as Assignee of J. B. BREWSTER & Co., Appellant, for the Appointment of a Referee.

FIFTH NATIONAL BANK OF THE CITY OF NEW YORK et al.,
Respondents.

1. ELECTION OF REMEDIES. Whether or not there has been an election of remedies is determined by the commencement, not by the result of an action.

2. ASSIGNMENT FOR CREDITORS—RES ADJUDICATA. The commencement of an action by a judgment-creditor to set aside an assignment for the benefit of creditors on the ground of fraud does not constitute an election by him to take in hostility to the assignment within the doctrine of the election of remedies; and although he is successful as to a portion of the property transferred to the assignee, if the judgment results in no benefit to him, he may take under the assignment notwithstanding his attack upon it, and the judgment constitutes no bar to such relief.

Matter of Garver, 84 App. Div. 262, affirmed.

(Argued October 7, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1903, which affirmed an order of Special Term denying a motion for the appointment of a referee to hear and determine disputed claims.

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Statement of case.

On or about October 11, 1895, J. B. Brewster & Co. executed an instrument in writing purporting to be a general assignment for the benefit of creditors, with preferences, to John A. Garver, appellant in this proceeding. Under such instrument Garver took possession of the property of J. B. Brewster & Co., consisting of machinery, fixtures, carriages and other personal property.

In order to set aside this assignment with preferences the respondents commenced actions against the corporation, its general assignee and the preferred creditors, in aid of their outstanding executions, and a stipulation was made that these actions should abide the result of the actions commenced by the Home Bank, which actions are as follows :

On or about November 18, 1895, the Home Bank commenced an action against John A. Garver, impleaded with J. B. Brewster & Co. and others, to have the said general assignment set aside as fraudulent and void as to it. Judgment therein was finally obtained declaring the assignment fraudulent and void as to the bank, and providing for the appointment of a receiver. Before the above judgment was obtained a temporary receiver was appointed, who, on entry of judgment, rendered an accounting and turned over all the property in his hands to the permanent receiver appointed under the judgment, who retained the same until the Appellate Division modified the judgment by striking out all provisions relating to the appointment of a receiver, affirming it in all other respects. The property coming into the hands of the temporary receiver was the non-leviable property and such leviable property as was left after the expenditure by the assignee of about \$7,000 in payment of wages of employees.

Among the non-leviable property was an insurance policy on the life of J. B. Brewster for \$50,000, upon which the corporation had procured a loan of \$16,000, subject to which loan the policy had been assigned to James B. Cone. This assignment was declared void by the judgment before mentioned. The temporary receiver sold some of the leviable property to the amount of \$5,000, and paid that amount upon

the loan of \$16,000. The permanent receiver sold more of the leviabie property to the amount of \$1,375.05, at the instance of the Home Bank, to pay a premium on the policy, leaving little or no leviabie property and about \$2,000 in cash and the policy as the sole assets. This policy has since been paid to the assignee, J. B. Brewster having died.

On the accounting of the permanent receiver, the referee found that the Home Bank had no lien on the non-leviabie property, including the insurance policy, and directed that all the property be restored to the general assignee. The bank then tried to reach the insurance policy, but was unsuccessful.

It then commenced another action against the general assignee and joined the sheriff as a nominal party, for the purpose of obtaining an adjudication that it, by reason of previous judgments, had a lien upon all the then leviabie property and also upon the proceeds of certain leviabie property which the assignee had in his hands.

This action was dismissed upon the ground that the issue involved had previously been determined. Claims were then filed with the assignee, and allowances claimed *pro rata*. The assignee refused to allow the claims, and made application to the court for a referee to determine the validity of the claims. The court denied the application for a reference, and adjudicated the claims to be valid, and ordered the assignee to receive and file the claims.

The appellate Division sustained their decision, and it is from that order this appeal is brought to this court.

James M. Beck for appellant. Where there exists an election between inconsistent remedies, a litigant is confined to the remedy which he first adopts. (Bigelow on Estoppel, 673; *Morris v. Rexford*, 18 N. Y. 552; *Rodermond v. Clark*, 46 N. Y. 354; *Kinney v. Kiernan*, 49 N. Y. 164; *Steinbach v. R. Ins. Co.*, 77 N. Y. 498; *Fields v. Bland*, 81 N. Y. 239.) This election is made when the remedy is invoked by the commencement of some legal proceeding. (*Burns v. Nevins*, 27 Barb. 493; *Morris v. Rexford*, 18 N.

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Y. 552; *Terry v. Munger*, 121 N. Y. 167; *Heidelberg v. Bank*, 87 Hun, 117; *Ins. Co. v. Lawrence*, 14 Johns. 55; *Steinbach v. Ins. Co.*, 77 N. Y. 498; *Bank of Oswego v. Burt*, 93 N. Y. 233; *Goss v. Mother*, 46 N. Y. 689; *Fowler v. B. S. Bank*, 113 N. Y. 450; *Allen v. Roosevelt*, 14 Wend. 100.) In the case at bar the creditors, having obtained a judgment that the assignment is invalid, seek to repudiate that judgment and to claim that the assignment is valid. This they cannot do under the doctrine of *res adjudicata*. (Herman on Res Adjudicata, § 133; *Steinbach v. Ins. Co.*, 77 N. Y. 498; *Fields v. Bland*, 81 N. Y. 237; *People v. Chalmers*, 60 N. Y. 154; *Matter of Cantor*, 31 App. Div. 19.) The claimants received a substantial benefit as a result of claiming adversely to the assignment. (*Horne Bank v. Brewster*, 15 App. Div. 338; *Matter of Ginsberg*, 21 App. Div. 525.)

Henry B. Twombly, William B. Putney and Richard B. Kelly for respondents. The creditors had the right to test the validity of the assignment to Garver and to seek to give their judgments priority, but receiving nothing as a result of said actions they had a right to prove their claims as creditors. (*Mills v. Parkhurst*, 126 N. Y. 89; *Sternfeld v. Simonson*, 44 Hun, 429; Bishop on Insol. Debtors, § 252.)

PARKER, Ch. J. The banks which are respondents herein were judgment creditors of J. B. Brewster & Co., a corporation which made a general assignment for the benefit of creditors, with preferences. An action was brought by one in behalf of all in aid of their outstanding executions, praying that as against plaintiff the assignment and all preferences therein should be declared null and void as to leviable property. Judgment was granted for the relief asked for in the complaint and a receiver was appointed, and was authorized to and did take control of the property from the assignee.

Subsequently the greater part of the leviable property was sold and the avails thereof devoted in the main to the pay-

ment of employees — who were entitled to be paid first by statute — and in paying a premium loan of \$16,000 on a policy of \$50,000 upon the life of J. B. Brewster, obtained for the benefit of the corporation, the policy being subject to that lien when assigned to one Cone. The assignment to Cone was, by the judgment to which we have referred, set aside, and it became necessary to pay the moneys advanced by Cone in order to secure the benefit of the policy to the creditors of the corporation. The proceeds of this policy, collected upon the death of J. B. Brewster, constituted all the assets of the estate that remained for distribution among the judgment creditors.

The Appellate Division modified the judgment by striking out the appointment of a receiver, and requiring him to turn over the moneys in his hands to the general assignee; but in all other respects the judgment was affirmed. The effect of this modification — after the personal property had been sold, and the avails disposed of, as pointed out — was to prevent the banks from receiving anything on account of their executions, for there was no longer any leviable property.

By this blunder in procedure the leviable property had been disposed of for the benefit of the assigned estate, and hence the only way open to the banks, which had prosecuted the litigation resulting in a fund to be distributed among the creditors, where otherwise there would have been none, was to present their claims to the assignee. But the assignee seemed to think they ought not to share with the general creditors — the beneficiaries of the banks' vigilance in prosecuting an action resulting in the setting aside of the assignment to Cone, and making necessary the distribution of the net proceeds of the policy. So the assignee took steps under the statute to have the court determine whether the judgments of the banks should be admitted as claims against the assigned estate.

The assignee made no question about the validity of those claims as against J. B. Brewster & Co. He could not well have done so, for they were established by judgments. Nor

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did he claim that they had been wholly or partly paid, nor that it was inequitable that the banks should share in the distribution of money which, but for their action, would not have been available for distribution. Instead the assignee claimed there was a rule of law which, applied to the facts detailed, would prevent the banks from obtaining an equitable share of the remaining assets.

The doctrine of election of remedies was invoked to work out the result the assignee seemed to desire. And if it be true that when the general assignment was made it became necessary for the banks to determine whether they would take under the assignment or in hostility to it, then the assignee's objection was well founded, for the banks, promptly discovering that their claims would not be paid under the general assignment, made an attack upon it to the extent, at least, that it transferred the leviable property to the assignee.

Now whatever may be the rule in other jurisdictions it is not the law in this state that the commencement of an action to attack the validity of an assignment operates to deprive the party commencing such action from sharing with other general creditors in the proceeds of the assigned estate in the event that such action shall prove fruitless in result.

That question was before this court and carefully considered in *Mills v. Parkhurst* (126 N. Y. 89), in which case certain judgment creditors of an insolvent debtor brought an action to set aside as fraudulent his assignment for benefit of creditors, in which they were eventually defeated. While an appeal was pending in this court from a judgment dismissing the complaint proceedings were taken to distribute the assigned estate, and objection was made by other creditors to the allowance of the claims of those judgment creditors upon the ground that they were proceeding in hostility to the assignment in prosecuting their action. The trial court and the General Term were persuaded that the doctrine of election of remedies was applicable to the situation, and refused to allow the judgment creditors to share in the estate; but in this court it was held that the doctrine had no application. The

kernel of the very careful and somewhat elaborate reasoning by which the conclusion was logically established was that the doctrine of election of remedies applies to cases where there is by law or by contract a choice between two remedies which proceed on opposite and irreconcilable claims of right ; in such a case, a party having resort to one remedy is bound by his first election, and hence barred from the prosecution of the other. But an assignment for the benefit of creditors is in no sense a contract between the debtor and his creditors, and does not depend for its validity in law upon their assent ; where a debtor has acted without fraud in fact or in law, and has complied with the requirements of the statute, the assignment will stand notwithstanding the opposition of a creditor, and by such opposition the latter is not deprived of his right to a distributive share under it. And it is undoubtedly true, as the learned judge said who wrote the opinion, that a contrary rule "would come so near to lending aid and encouragement to attempts at fraudulent assignments as to render its adoption impossible." The discussion of the court in that case is alike applicable to this one, and the decision is in point and controlling.

It is suggested, however, that it is possible to found a different ruling in this case from the one made in *Mills'* case upon the fact that in *Mills'* case plaintiffs were unsuccessful, while in this case plaintiff succeeded. In other words, that where a judgment creditor elects, without justification, to attack the general assignment upon the ground that the assignor intended to cheat and defraud creditors, his claim may share in the estate after the judgment has gone against him, but if a judgment creditor *successfully* attacks a general assignment on the *same* ground he may *not* share in the distribution of a fund which may be the result of such litigation.

It has been argued that while in the first case it can no longer be said in this state that there was an election of remedies because *Mills'* case has so decided, it may, nevertheless, be said in the latter case, because in *Mills'* case plaintiffs failed to show the fraud, while in this case plaintiff succeeded.

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But argument — if any there be to offer — in support of such position is fully met by authority, though it would hardly seem that authority is necessary to support the proposition that whether there has been an election of remedies is not determinable by the result of the suit, but is by its commencement.

In *Moller v. Tuska* (87 N. Y. 166) plaintiffs sold and delivered a quantity of sugar to parties who immediately transferred it to defendants, and then went into voluntary bankruptcy. Plaintiffs immediately brought action to recover possession of the goods on the ground of fraud, but while the action was pending proved a claim in bankruptcy as for goods sold and received from the assignee in bankruptcy a dividend thereon. Later the register in bankruptcy expunged the claim from the record on the ground that the action brought by plaintiffs was in disaffirmance of the sale, and thereafter demanded and received back the dividend. Subsequently in the action brought against the transferee to recover possession of the goods, a motion was made to dismiss the complaint on the ground that by proving the claim in bankruptcy and taking the dividend plaintiff affirmed the sale and had no longer any right to the goods. The motion was granted, but the General Term and this court were of a different opinion, the ground of the decision being that as plaintiffs had on discovery of the fraud an election of remedies — either to disaffirm the sale and recover the property or to sue for the principal — they manifested their election by *bringing the action* to recover the possession of the goods, and were bound by such election, and while they subsequently presented their claim to the assignee, who accepted it and paid a dividend thereon, nevertheless, because of the election necessarily made by plaintiffs in the commencing of their action, there was no debt on the part of the estate in bankruptcy to them, and the assignee was without power by his acceptance of the claim and payment of a dividend to create a debt where none existed, and hence could not affect the estate by an attempt to assent to a rescission of the election.

It is, therefore, the settled law of this court that an election of remedies is determined by the commencement of an action, and not by the result of it, and *Mills' Case (supra)* requires the holding that the commencement of an action to set aside an assignment on the ground of fraud does not constitute an election to take in hostility to an assignment, within the doctrine of election of remedies, and hence a creditor may take under the assignment notwithstanding his attack upon it.

Since the foregoing was written it has been suggested for the first time that it is not after all the doctrine of election of remedies that has been invoked, but a remedy without a name that works out the same result. It is conceded that this new remedy could not be applied in *Mills' Case (supra)*, and it should be conceded that if it could not be applied in that case it should not be in this, for very obvious reasons. The only difference between that case and this is, that in that one the action failed, in this it succeeded — which means that in that case the assignor was not guilty of fraud, while in this case the assignor was adjudged guilty of fraud. But in the first case the court pointed out that the creditor should not be deprived of his share of the assets for bringing an unsuccessful litigation, because to do so would lend “encouragement to attempts at fraudulent assignments.” It is safe to say that that reason is certainly as applicable to a case where the fraud both exists and is proved. Otherwise the legal situation would be: It is well to bring an unsuccessful action at great cost to the fund in order to discourage fraud; but it is not well to discourage fraud too much, so be careful not to establish it, for a penalty is visited upon one who brings such an action and succeeds.

It is said that the doctrine of *res adjudicata* has application to this situation, and will so operate as to deprive plaintiff of its share of the fund that would have no existence but for its litigation.

There have been two adjudications prior to this one. In the first place it was adjudicated between J. B. Brewster & Co. (before the assignment) and the Home Bank that J. B. Brew-

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ster & Co. was indebted to it. The judgment into which that litigation ripened stands. Its validity as an adjudication is not challenged, and cannot be; and it has never been paid. That being so, the court has no power to deprive the plaintiff in that judgment of its share in the general assets of J. B. Brewster & Co., for the judgment establishes the claim, and carries upon its face the right to share with other claims in the assigned estate.

The second adjudication was made in an action brought by the Home Bank against the assignor, J. B. Brewster & Co. and the assignee, and it adjudges that the assignor was guilty of fraud which rendered the assignment void as to the bank, and set aside a transfer of a policy of insurance, a part of the proceeds of which constitute the entire assets now to be distributed. While the court adjudged necessarily that the bank had the right to pursue the remedy which it did, it did not attempt to determine that the bank had no other remedy, and that should it fail to secure money enough by that proceeding to satisfy its claim, it could not resort to other proceedings to reach the property, if any should be discovered, of the assignor, and to share in the distribution of the assigned estate; and that being so, it is difficult to see how it can be said that the judgment in that action affects in any way the valid judgments which the bank now properly insists should share in the distribution of the fund among the general creditors.

The order should be affirmed, with costs.

BARTLETT, J. (dissenting). A reference to some facts, in this complicated case, is essential for the purpose of making clear the points I seek to raise. The chronology is important. The firm of J. B. Brewster & Company, carriage manufacturers in the city of New York, made a general assignment for the benefit of creditors to John A. Garver on the 11th day of October, 1895. Prior to that time several banks and the Spring Perch Company, creditors of the assignors, had recovered judgments at law on their claims and issued executions which were then outstanding in the hands of the sheriff.

Shortly after the execution of the general assignment and transfers these judgment creditors brought separate actions in equity attacking the general assignment and other transfers of property as fraudulent; also in aid of the executions in the hands of the sheriff, it being alleged that the general assignment and other transfers were obstacles to making the levy upon such of the assigned property as was subject thereto. It was thereupon stipulated that the suit of the Home Bank, which was begun in November, 1895, should be tried and the others abide the result.

It was conceded at the trial of this latter suit that the assignee was not guilty of intentional fraud in connection with said assignment and transfers in which he was concerned.

The suit of the Home Bank resulted in a decision setting aside the general assignment and transfers attacked as fraudulent, as to the bank, thus removing all obstacles to an immediate levy of the executions.

It is at this point that we encounter irregularities of practice resulting in wasting the assets of this estate to a very large extent. The Special Term judgment under this decision was entered on July 10th, 1896. The plaintiff erroneously treated the action as a judgment creditor's suit after execution returned unsatisfied instead, as it really was, an action to remove obstacles to the levying of executions outstanding under judgments at law. The result of this error was the entry of a judgment which extended the temporary receivership (a temporary receiver having been appointed, *pendente lite*, at the time the action was begun) to a permanent receivership then created of all the property of the assignors, including non-leviable property, over which the court had no jurisdiction in that action. The judgment further provided that the temporary receiver should account and pay over to the permanent receiver the assets in his hands. Upon appeal the Appellate Division modified this judgment by striking out the provisions as to a receivership, thereby leaving the judgment in proper form, the leviable property to be redelivered to the assignee "to the end that the plaintiff may levy its executions

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upon such property and sell the same to satisfy such executions or judgments upon which they were issued." The judgment was so amended by the Appellate Division May 4th, 1897.-

It thus appears that at the time of the Special Term judgment, July 10th, 1896, the judgment creditors were at liberty, had they followed the proper practice, to issue their executions against the leviable property, and a similar opportunity was afforded them when the Appellate Division modified the judgment, as above stated, May 4th, 1897.

It is apparent that these judgment creditors were not content to follow leviable property which was in existence at that time, but were reaching out for assets that could not be dealt with in aid of the executions. After the Special Term judgment had been so modified the plaintiff entered an order of reference to take and state the accounts of the permanent receiver. The referee in this accounting made his report December 2nd, 1897, in which he found, among other things, that the plaintiff had no lien upon the non-leivable assets, including a life insurance policy for \$50,000 on the life of J. B. Brewster, and directed all the property to be restored to the assignee. Thereupon the plaintiff made a motion at Special Term to set aside and disaffirm the report of the referee. At the same time a motion was made by the assignee to overrule the exceptions and confirm the report. The Special Term sustained the exceptions of the plaintiff and directed the permanent receiver to pay to the sheriff of the county of New York the balance of cash in his hands, to be applied on account of plaintiff's executions, and to deliver to the sheriff carriages and lumber to the end that the same might be sold to satisfy the executions. It was further ordered that the receiver should deliver the policy of insurance to the defendant upon receiving the sum of \$6,272.25 from the proceeds thereof. The defendant appealed from this order to the Appellate Division, where it was reversed, and the report of the referee in all respects confirmed. (33 App. Div. 330.) The plaintiff appealed from this latter order to the Court of

Appeals, where the appeal was dismissed on the ground that it was an order in the action and not appealable. (159 N. Y. 526.) This order was entered about April 25, 1899.

Early in November, 1898, after the Appellate Division had confirmed the report of the referee, the permanent receiver, after the defendant had made a motion to punish him for contempt for failure to comply with the directions of the referee's report, paid over to the assignee the sum of \$866.86, and also delivered to him certain carriages. We thus have leviable assets in the hands of the assignee at this time.

It appears that on November 18th, 1898, after due notice, the assignee sold all of said carriages at public auction, receiving therefor the sum of \$2,219.90, which shows clearly the amount of leviable assets in the hands of the assignee, and which, with a quantity of lumber, had theretofore been in the possession of the permanent receiver ever since the Special Term judgment of July 10th, 1896. During this entire period there was no obstacle to levying under the executions.

It is argued that the leviable property having been disposed of for the benefit of the assigned estate, these judgment creditors, who had prosecuted litigations resulting in a fund to be distributed among the general creditors where otherwise there would have been none, are entitled to come in and share therein with the other general creditors. A few more facts will shed light at this point. Prior to the judgment of July 10th, 1896, the court made an order upon the joint affidavit of the temporary receiver and assignee, authorizing them to pay out of the funds in their possession the sum of \$16,000.00, constituting a lien on the said policy of life insurance, together with interest thereon, and to hold the policy jointly during the pendency of the action; the interest amounted to \$1,048.00. This sum of \$17,048.00 was accordingly paid to the American Deposit and Loan Company, the temporary receiver contributing \$5,000.00 and the assignee \$12,048.00. The temporary receiver and the assignee were at that time in joint control of the estate, the action not having proceeded to judgment in the Special Term.

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It appears in the accounting of the permanent receiver before the referee that the assignee advanced the further sum of \$3,662.76 on account of premiums due on the said policy, making with said sum of \$12,048.00 the total of \$15,710.76 that he advanced to protect the policy.

It is thus established that the assignee had made the greater part of the advances necessary to protect the policy of life insurance, and would have had no difficulty in caring for the same entirely had it not been for the fact that he was improperly deprived of the full control of the possession of the assigned estate by a judgment that was unauthorized by law and was practically set aside by the Appellate Division, that learned court having declared the receivership and the removal of the estate from the assignee's control to be wholly irregular.

I have before stated that the erroneous practice of the plaintiff in the Home Bank case had to a great extent wasted this estate. The attorney for the temporary receiver was awarded the sum of \$1,028.30 for counsel fee and disbursements; the attorney for the permanent receiver was awarded the sum of \$1,118.38 as counsel fee and disbursements; the referee received the sum of \$300.00 for his services; the assignee also states in his affidavit in this proceeding that the estate has been put to other very great expense by reason of the litigation arising from this irregular practice.

These general statements of the assignee will be better appreciated when it is understood that the Home Bank began a second action against the assignee and the sheriff of the county of New York, wherein it demanded, in a complaint verified December 20th, 1899, the following relief: (1) That it may be adjudged and determined that the plaintiff the Home Bank had and has a lien upon all leviable property of said J. B. Brewster & Company, which has come into the hands or possession of the defendant Garver, and which was in the city and county of New York at the time of the issuing of the several executions hereinbefore referred to, and that the said lien attach to and follow the proceeds of the said leviable property which has come into the possession of the said

defendant Garver; (2) that the defendant Garver account for and deliver and pay over to the sheriff of the county of New York all said leviable property or its proceeds as may be sufficient to satisfy the said executions upon the judgments recovered by the plaintiff against J. B. Brewster & Company hereinbefore set forth; (3) for further relief.

The action was carried through the courts with this result: The Special Term dismissed the complaint; the Appellate Division and this court affirmed the judgment. (172 N. Y. 632, without opinion.)

The facts of this case thus disclose that the judgment creditors, throughout all of these litigations, were confined simply to their remedy to reach leviable assets; that they failed to properly pursue it and neglected to lay hold of such assets in the possession of the permanent receiver and the assignee when no obstacles stood in their way of enforcing the executions in the hands of the sheriff. It remains to consider whether on this state of facts, these judgment creditors are estopped, by years of wasting litigation, from proving their debts as general creditors in the assignment proceedings.

It has been frequently held that a creditor who receives any benefit under a general assignment cannot afterwards attack it. It would seem, from parity of reasoning, that a creditor who has successfully attacked the assignment and other transfers and had them set aside as fraudulent as to him; who has had the way opened to him to enforce his executions at law, and who has failed to realize valuable assets because he did not avail himself of the remedy at law placed in his hands, should also be estopped.

It is apparent that the technical rule as to election of remedy, illustrated by a long line of decisions, has no application to the present case. I refer to those authorities which deal with parties between whom existed a relation created by contract, and in some of which the plaintiff rescinded the contract and brought replevin for goods procured by fraud and in others stood upon the contract. (*Morris v. Rexford*, 18 N. Y. 552; *Kinney v. Kiernan*, 49 N. Y. 164; *Moller v.*

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Tuska, 87 N. Y. 166 ; *Rodermund v. Clark*, 46 N. Y. 354, and many other cases.)

In the case before us the relation between the parties is not contractual, but is created by law — by the statute which provides for the execution of general assignments for the benefit of creditors and the distribution of estates thereunder.

This court has held (*Mills v. Parkhurst*, 126 N. Y. 89) that it should be open to any creditor to attack the general assignment on the ground of fraud, and if he fails he may, notwithstanding this futile effort, prove his debt in the assignment proceeding.

This decision obviously rests on considerations of public policy which permit the attack and the further fact that the attacking creditor had not disturbed the assignee in the custody and management of the estate, as he was defeated.

In such a case there is no election of remedy by the mere beginning of the action, as the rights of the creditor are determined by the result of the action. If he fails he may still prove his debt under the general assignment. If the creditor succeeds in his action and enters final judgment, what is the logical, legal result? In beginning his action, as we have seen, he is not held to the strict rule of election of remedy, but he must abide the result.

In the case before us the plaintiff is confronted by its own final judgment securing to it the relief for which it sued, to wit, the removal of obstructions to its execution in the hands of the sheriff and permitting that officer to levy on all personal property subject thereto. The plaintiff is thereby estopped by the doctrine of *res adjudicata*; it is not a question of election of remedy, but a remedy exhausted, pursued to a final judgment of record, declaring the general assignment void as to it and granting the relief for which it prayed. A judgment bars any action or proceeding inconsistent with its provisions. (*Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498; *Fields v. Bland*, 81 N. Y. 239.)

In the case 77 N. Y. 498 (*supra*) it was held that when a party has elected to sue upon a written contract and has been

defeated, he cannot thereafter bring an action to reform the contract. Judge EARL said (p. 502): "This is a case, it seems to me, where the doctrine of *res adjudicata* must apply, and bar a recovery, unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded."

In the case at bar the plaintiff came into court and said, in substance, it had a judgment at law, with execution in the hands of the sheriff; the general assignment was an obstacle to a levy; its removal was asked. The court by judgment granted this relief, and must not the doctrine of *res adjudicata* be applied, unless plain principles of law are disregarded? The uncontradicted facts of this case, already recited, show that for a long period of time the plaintiff failed to levy on personal property when it might have done so, every obstacle having been removed by the decision and judgment of the court.

No case has been called to my attention in this court holding that where a creditor has proceeded to final judgment and succeeded in having a general assignment declared fraudulent as to him, he having received substantial benefits under his judgment, or was entitled to the same, that nevertheless he could come in as a creditor and prove his claim thereunder.

Two cases in this court were cited by the courts below in favor of the plaintiff. In the case of *Mills v. Parkhurst* (126 N. Y. 89) a creditor sought to prove his claim after having failed in his attack upon the assignment. All that was actually decided, or could be determined, was that such a creditor might prove his claim, notwithstanding his unsuccessful suit. The court said (p. 95): "A creditor's only alternative, if he is not content to take what would thus come to him, is to endeavor to set aside the deed or assignment if he deems himself possessed of the requisite evidence of its invalidity at law. If there is any election for him to make it can only be with respect to what remedies may be available to him in order to right himself upon his judgment against the assignee and to avoid the assignment. * * * It in no wise militated against the right of the appellant, if defeated

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upon that issue, to share in the assigned estate on the basis of the distribution provided in the debtor's deed to his assignee."

The reasoning of this opinion clearly recognizes the possibility of a situation where a creditor, succeeding in his attack upon the assignment, may place himself in a position which would preclude him from proving his claim.

The case of *Groves v. Rice* (148 N. Y. 227) is distinguishable in its facts from the case before us. In that case the creditor was held to have so recognized the assignment, for the purpose of gaining an advantage thereunder, that he was estopped from attacking it. It is a case where the doctrine of estoppel was applied in order to protect the assignee and creditors.

In the case before us the doctrine of *res adjudicata* controls.

I am of opinion that the fund now in the hands of the assignee is only a small residue, preserved to the estate, notwithstanding the litigations of the judgment creditors, by the persistent efforts of the assignee to save something for the general creditors after the unwarranted and unnecessary receiverships, accountings and unauthorized actions had run their asset-wasting course.

The orders of the Special Term and Appellate Division should be reversed and the claims of the respondents disallowed, with costs.

O'BRIEN, MARTIN, CULLEN and WERNER, JJ., concur with PARKER, Ch. J.; VANN, J., concurs with BARTLETT, J.

Order affirmed.

HENRY A. CONOLLY, as Surviving Partner of the Firm of E. D. CONOLLY & Sons, Respondent, v. ROSALIE HYAMS, Individually and as Executrix of JOEL E. HYAMS, Deceased, Appellant.

MECHANIC'S LIEN — ACTION TO FORECLOSE LIEN — WHEN ACTION COMMENCED WITHIN ONE YEAR AFTER FILING LIEN IS DISMISSED FOR LACK OF EVIDENCE A NEW ACTION MAY BE COMMENCED UNDER CODE CIV. PRO. § 405, WITHIN ONE YEAR AFTER FINAL DETERMINATION OF FIRST ACTION. Where a mechanic's lien was filed January 24, 1889, and

an action to foreclose the lien, duly commenced February 15, 1889, was dismissed "on the merits," for failure to furnish an architect's certificate of performance of the work, by a judgment entered August 4, 1899, and, on appeal, the Appellate Division, on March 9, 1900, modified the judgment by striking therefrom the words "on the merits," and affirmed it as modified, a new action to foreclose the lien, commenced March 15, 1900, is not barred by the provision of the Lien Law, that a lien shall not continue for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, since the statute does not in express terms prohibit an action to foreclose a lien unless that action be commenced within one year, but enacts that the lien shall cease unless an action be brought thereon within one year; the first action was commenced within that time, and, therefore, the cause of action is saved by the statute (Code Civ. Pro. § 405), which provides that if an action be commenced within the time limited therefor, and be terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or termination.

Conolly v. Hyams, 84 App. Div. 641, affirmed.

(Argued October 29, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 6, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

M. S. Guiterman for appellant. Section 405 of the Code of Civil Procedure, permitting in case of dismissal of the complaint, but not on the merits, the commencement of a new action after the expiration of the limitation, does not apply to an action brought under a special law creating a right of which time is the essence and forms a constituent element. (*Hill v. Bd. of Suprs.*, 119 N. Y. 344; *Hamilton v. R. Ins. Co.*, 156 N. Y. 327; *Weyer v. Beach*, 79 N. Y. 409; *McDonald v. Mayor, etc.*, 58 App. Div. 73.) When a claim secured by mechanic's lien has become barred by the Statute of Limitations, a lien cannot be enforced. (*Hills v. Halliwell*, 50 Conn. 270.)

N. Y. Rep.] Opinion of the Court, per CULLEN, J.

Leopold Leo, William Haupt and Benjamin Yates for respondent. This action, having been begun within one year after the previous action terminated, "not upon the merits," falls within the purview of section 405 of the Code of Civil Procedure, and was begun in time. (*Titus v. Poole*, 145 N. Y. 414; *Hayden v. Pierce*, 144 N. Y. 512; *Hamilton v. R. Ins. Co.*, 156 N. Y. 327; *Budd v. Walker*, 29 Inn, 344; *N. P. Assn. v. Lloyd*, 167 N. Y. 438.)

CULLEN, J. The action was brought to foreclose a mechanic's lien on real property situated in the city of New York. There is but one question presented by this appeal which survives the unanimous decision by the Appellate Division, that is, whether the plaintiff's lien had been lost prior to the commencement of this action. Notice of the lien was duly filed on the 24th day of January, 1889. The plaintiff commenced an action in the Court of Common Pleas to foreclose such lien on February 15, 1889. In that action the plaintiff was defeated for failure to produce a certificate from the architect of the performance of the work, and judgment was entered therein dismissing the complaint on the merits on August 4, 1899. On appeal, the Appellate Division, on March 9, 1900, modified the judgment by striking therefrom the words "on the merits," and affirmed it as modified. On March 15, 1900, the plaintiff commenced this action to foreclose the lien and has recovered judgment therein.

The appellant contends that under the provisions of section 6, chapter 342 of the Laws of 1885, and those of section 16 of the Lien Law of 1897 (Chap. 418), which are substantially the same, both plaintiff's lien and his money claim were lost by the length of time which elapsed between the filing of the lien and the commencement of the present action. These provisions enact that a lien shall not continue for a longer period than one year after the notice of the lien has been filed, unless within that time an action is commenced to foreclose the lien and a notice of the pendency thereof filed with the county clerk. The respondent claims that his cause of action is

saved by section 405 of the Code of Civil Procedure, which provides that if an action be commenced within the time limited therefor, and be terminated in any other manner than a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or determination. If this section applies then it is conceded that the present action was brought in time. But the appellant insists that the case is governed exclusively by the provisions of the Mechanics' Lien Law and does not fall within the section of the Code cited. In support of this claim he relies on the decision of this court in *Hill v. Bd. Supervisors Rensselaer Co.* (119 N. Y. 344). That was an action brought under chapter 428 of the Laws of 1855 to recover compensation for the destruction of plaintiff's property by a mob or riot. The act provided that "no action shall be maintained under the provisions of this act unless the same be brought within three months after the loss or injury." An action within the time limited was brought in the County Court, but the claim exceeding in amount the jurisdiction of that court, the action was dismissed. Subsequently and after the expiration of three months from the time of the loss another action was commenced in the Supreme Court. It was held by this court that the provisions of section 405 of the Code did not apply and the action could not be brought after the statutory period. The language of the act of 1855, however, is very different from that of the Mechanics' Lien Law. The first statute provided that no action should be maintained unless brought within three months. Thus the very action in which the plaintiff could alone obtain compensation was forbidden by the express terms of the statute. The provisions of the Lien Law relating to the case now before us enact that the lien shall cease unless an action be brought thereon within one year. But this provision of the statute has been complied with. Therefore, the application of the beneficial provisions of section 405 of the Code does

not contravene the commands of the statute. The tendency of the latest decisions of this court has been to extend to all claims the benefit of the exceptions given by the Code of Civil Procedure to the bar of the Statute of Limitation, except where there is an express statute or contract to the contrary. So in *Hayden v. Pierce* (144 N. Y. 512) it was held that the provisions of section 401, declaring that when the cause of action accrues against a person who is without the state the action may be commenced against him within the time limited therefor after his return into the state, applied to the case of a rejected claim against the estate of the deceased person, and that the claim was not barred by the lapse of six months prescribed by section 1822. In *Titus v. Poole* (145 N. Y. 414) it was held that the provisions of section 405 of the Code which we have discussed applied to rejected claims against the estate of deceased persons, notwithstanding the short Statute of Limitations against such claims. In *Hamilton v. Royal Insurance Company* (156 N. Y. 327) an insurance policy provided that no action thereon should be maintained unless commenced within twelve months after the fire. It was held that the provisions of section 399 of the Code providing that an attempt to commence an action in a court of record shall be deemed equivalent to the commencement thereof applied to the contract, and that a delivery of the summons to the sheriff within the time limited was a sufficient compliance with the terms of the policy. The principle of these decisions controls the disposition of this case, and in conformity therewith we hold that the present action was brought in time.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and WERNER, JJ., concur.

Judgment affirmed.

THE KNICKERBOCKER ICE COMPANY, Appellant, v. THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY et al., Respondents.

1. **NEW YORK CITY — TITLE TO LANDS UNDER WATER.** The title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and acts of the legislature (L. 1807, ch. 115; L. 1826, ch. 58; L. 1837, ch. 182) was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway.

2. **TITLE TO LANDS IN THE PUBLIC STREETS HELD IN TRUST.** The title of the city of New York in and to the lands within its public streets is held in trust for the public use.

3. **RIGHTS OF GENERAL PUBLIC OVER PLACES WHERE LAND HIGHWAYS AND NAVIGABLE WATERS MEET.** The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent water, the highway is by operation of law extended by the length of the added structure.

4. **POWER OF LEGISLATURE TO PRESCRIBE THAT SUBMERGED LAND SHOULD BE USED FOR STREETS.** The legislature had the power in granting additional submerged lands to the city of New York (L. 1837, ch. 182) to prescribe that such lands should be used for the purpose of an exterior street to which other streets then intersecting the river should be extended.

5. **CONVEYANCE BY THE CITY OF NEW YORK OF PIER IN FORTY-THIRD STREET NOT A CONVEYANCE IN FEE OF LAND COVERED BY THE PIER — EFFECT OF COVENANTS CONTAINED IN PRIOR DEEDS OF ADJOINING LAND UNDER WATER TO SAME GRANTEE — ACTION PREDICATED UPON TITLE IN FEE NOT MAINTAINABLE.** A conveyance by the city of New York in 1852 of a pier situated in Forty-third street in the Hudson river, which street was laid out under the act of 1807 to high-water mark, and by the act of 1837 was extended to the exterior line of the city, containing the following description: "Beginning at the point formed by the intersection of the northerly side of 43rd street with the easterly line or side of 12th Avenue; running thence southerly along the easterly side of 12th Avenue to the northerly side of said pier; thence westerly 211 feet three inches; thence southerly 40 feet five inches; thence easterly 212 feet two inches, to the easterly side of 12th Avenue, and thence southerly to a point where the southerly side of 43rd street intersects the said 12th Avenue. Together with the extent of the present width of the street with the right of wharfage thereon, and together with all and singular the tenements, hereditaments," etc., subject, however, to the right of the city to order the pier extended into the river at the

expense of Lindsley, or to extend the pier at the city's expense, or to grant the right to do so to other parties if Lindsley should fail to make such extension when directed so to do, "in which case the right to wharfage, etc., at the portion of the pier extended shall belong to the parties at whose expense the extension shall be made," conveys, not the absolute fee to the land covered by the pier, but the incorporeal hereditament attached to the fee, *i. e.*, the right to maintain a pier and to collect wharfage at the foot of Forty-third street in the Hudson river, whenever that point should be located by lawful authority, since the city held the land under a public trust and could not convey it in contravention thereof, of which fact the grantee was chargeable with constructive notice, especially where by prior deeds to him of adjoining land under water, the city expressly reserved so much thereof as formed parts of Twelfth and Thirteenth avenues and Forty-third street, and he covenanted therein that at the request of the city he would construct bulkheads and that the streets should always remain public streets, and, therefore, he had actual knowledge of the limitations upon his title. Whatever, therefore, may be the rights acquired by his successors in title, they include no right to maintain an action which can only be predicated upon a title in fee.

Knickerbocker Ice Co. v. Forty-second St. & G. S. F. R. R. Co., 85 App. Div. 530, affirmed.

(Argued October 20, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 22, 1903, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Albert Stickney and *M. Edward Kelley* for appellant. Assuming the validity of the deed of 1852, according to its terms, the right of the plaintiff to equitable relief, based on the inadequacy of any remedy at law, cannot be seriously questioned, unless the rights of the plaintiff under the deed of 1852 be restricted by the covenants contained in the prior deeds of 1850. (*Munn v. People*, 94 U. S. 113; *People v. N. Y. C. R. R. Co.*, 28 Hun, 543; *Gardner v. Vil. of Newburg*, 2 Johns. Ch. 162; *Sage v. City of Brooklyn*, 89 N. Y. 189; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *Williams v.*

Mayor, etc., 105 N. Y. 419; *Maximilian v. Mayor, etc.*, 62 N. Y. 160; *Ham v. Mayor, etc.*, 70 N. Y. 459; *Smith v. City of Rochester*, 76 N. Y. 506; *F. Ins. Co. v. Vil. of Keeseville*, 148 N. Y. 46.) The city, under its different grants from the state, acquired in the first instance the ownership of the land under water in front of high-water mark, with the power to convey its property rights in that land under water, and any superstructure thereon, to private individuals, until the change in the policy as to the city water front, which was created by the act of 1871 establishing the dock department. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *Kingsland v. Mayor, etc.*, 110 N. Y. 569; *Williams v. Mayor, etc.*, 105 N. Y. 419.) The power of the city to convey the "pier" by the deed of 1852 is free from doubt, and cannot be questioned under a contention that the "pier," either as dry land or as land under water, was public property, or property affected by a right of use in "the public." (*City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397; *Pearsall v. Post*, 20 Wend. 111; *Post v. Pearsall*, 22 Wend. 425; *Wetmore v. A. L. Co.*, 37 Barb. 70; *Wetmore v. B. G. L. Co.*, 42 N. Y. 384; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *Williams v. Mayor, etc.*, 105 N. Y. 419; *Kingsland v. Mayor, etc.*, 110 N. Y. 569; *Mark v. Vil. of West Troy*, 151 N. Y. 453; *People v. Laimbeer*, 5 Den. 9; *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 543.) The legal character of the "pier" in question, as land under water with a superstructure resting thereon, and not a public "street," is beyond question. (*Matter of M. P. Ground*, 60 N. Y. 319; *Matter of Rhinelanders*, 68 N. Y. 105; *Wagner v. Perry*, 47 Hun, 516.) The contention of the defendants as to a want of power in the city to convey the "pier" in question to a private individual wholly ignores the well-recognized legal distinction between the private ownership of property and its public use. (*Munn v. Illinois*, 94 U. S. 113; *People v. N. Y. C. R. R. Co.*, 28 Hun, 543; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *Mayor, etc., v. Hart*, 95 N. Y. 443; *Williams v. Mayor, etc.*, 105 N. Y. 419; *Kingsland v. Mayor, etc.*, 110 N. Y. 569.)

The performance by Lindsley's grantees of the covenants contained in the earlier deeds of 1850, providing for the construction of streets, bulkheads, piers and wharves, has now been made impossible by the acts of 1871, nor does the resolution of the dock department, which is set up as a justification of the intended destruction of plaintiff's pier, call for such construction as was contemplated by those covenants, and agreed to be performed by the grantees. (*Palmer v. Gould*, 144 N. Y. 671; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Phillips v. Berger*, 8 Barb. 527.) Even if, however, the performance of the covenants in the deeds of 1850 were still possible, or had been really required by any action of the dock department, the obligation of the covenants contained in the deeds of 1850 was, as to Forty-third street, essentially modified, if not wholly abrogated, by the subsequent conveyance of the "pier" itself by the deed of November 11, 1852. (*Langdon v. Mayor, etc.*, 93 N. Y. 129.)

James A. Deering and *Henry A. Robinson* for Forty-second Street and Grand Street Ferry Railroad Company, respondent. Assuming that the plaintiff has a good title to the pier and the ground upon which it stood when this action was begun, nevertheless its right to use the same was subject to the conditions and covenants contained in the grant of July 1, 1850, to Lindsley, the plaintiff's predecessor in title, and the statutes then in force and subsequently made under which the city could lawfully require the railroad company to make such water-front improvements as the city might thereafter deem proper. Such improvements cannot be enjoined. (*Cox v. State*, 144 N. Y. 405; *People v. Vanderbilt*, 26 N. Y. 287; *Whitney v. Mayor, etc.*, 6 Abb. [N. C.] 329; *I. R. R. Co. v. Illinois*, 146 U. S. 453; *Slingerland v. I. C. Co.*, 169 N. Y. 60.) The plaintiff has no title to the pier in question or to the ground upon which it stood. It has nothing upon which to base a claim to equitable relief for any contemplated interference with property rights. (*Bruen v. M. R. Co.*, 39 N. Y. S. R. 36; *Dean v. M. El. R. Co.*,

119 N. Y. 540; *Hughes v. M. R. Co.*, 130 N. Y. 14; *H. R. R. Co. v. Loeb*, 7 Robt. 418; *S. W. Co. v. City of Syracuse*, 116 N. Y. 167; Tiedeman on Mun. Corp. § 169; *Donovan v. City of New York*, 33 N. Y. 291; *Lyddy v. Long Island City*, 104 N. Y. 218; *McDonald v. Mayor, etc.*, 68 N. Y. 23; *Parr v. Vil. of Greenbush*, 72 N. Y. 463; *Martin v. Mayor, etc.*, 1 Hill, 545.)

George L. Rives, Corporation Counsel (*Theodore Connoly* and *E. J. Freedman* of counsel), for City of New York et al., respondents. The plaintiff has failed to prove any cause of action entitling it to equitable relief, and under the pleadings and evidence no other relief can be granted. (*K. I. Co. v. F. S. S. R. R. Co.*, 16 J. & S. 499; *Munson v. Reid*, 46 Hun, 403; *Wells v. Garbutt*, 132 N. Y. 436.) Plaintiff had no title to the pier, to the land under it nor to the adjacent lands, and nothing less would support the action. (*People v. Laimbeer*, 5 Den. 9; *Matter of City of Brooklyn*, 73 N. Y. 179; 2 Dillon on Mun. Corp. [4th ed.] § 650; *Brooklyn v. Armstrong*, 45 N. Y. 234; *S. V. O. Asylum v. City of Troy*, 76 N. Y. 108; *Kane v. N. Y. El. R. R. Co.*, 125 N. Y. 183; *People v. Mallory*, 46 How. Pr. 256; *Taylor v. A. M. Ins. Co.*, 37 N. Y. 275; *Marshall v. Guion*, 11 N. Y. 461; *Comrs. of Pilots v. Clark*, 33 N. Y. 251; *Radway v. Briggs*, 37 N. Y. 256.) The city did not convey, nor attempt to convey, any land by the execution of the deed to the pier. (*Wheeler v. Spinola*, 54 N. Y. 388.)

WERNER, J. Under claim of title to a pier and the lands occupied by it, at Forty-third street and the Hudson river, in the city of New York, the plaintiff herein commenced this action and obtained an injunction *pendente lite*, restraining the defendants from effecting certain harbor improvements projected, under legislative authority, by the city of New York. The decision of the trial court was in the short form and was adverse to the plaintiff. The judgment entered upon that decision has been unanimously affirmed by the Appellate

Division. Many interesting questions have been most ably presented on both sides, but in its last analysis the case turns upon the nature and extent of the grant to the plaintiff. If, as the plaintiff contends, that grant purported to vest in it an absolute fee to the *locus in quo*, then numerous other questions affecting the validity of the grant remain to be considered. If, on the other hand, the plaintiff never had a title in fee to the lands in controversy, then this action must fail, for the plaintiff's claim to the relief asked for in the complaint can only be predicated upon the title which he asserts. A short recital of a few salient facts will suffice to show why we think the judgment of the courts below must be affirmed.

Under the Dongan and Montgomerie charters the city of New York acquired title to the tideway surrounding the island of Manhattan. In 1807 the state granted to the city a strip of land under water along the westerly side of the island, which extended from low-water mark westerly into the Hudson river, a distance of 400 feet. On the Hudson river side of the island the city was, therefore, the owner of the lands between high-water mark and low-water mark and for a distance into the river of 400 feet beyond low-water mark.

This was the situation when, under the act of 1807, the street commissioners' map of 1811 was filed laying out Forty-second and Forty-third streets from high-water mark on the East river to high-water mark on the Hudson (or North) river.

The next chapter in historical progression is the act of the legislature of 1837 (Ch. 182) entitled "An act to establish a permanent exterior street or avenue in the City of New York along the easterly shore of the North or Hudson's River, and for other purposes." Section 1 of that act approved of the map made by George B. Smith in 1837 pursuant to a resolution of the board of aldermen, upon which Thirteenth avenue was laid out as the permanent exterior line along the easterly shore of the Hudson river between Hammond (W. 11th) street and 135th street. Section 2 provided that the streets southerly of and including 135th street, as laid out under the act of 1807, "shall be continued and extended westerly along

the present lines thereof from their present terminations on the said map or plan respectively to the said Thirteenth Avenue." Section 3 granted to the city the lands under the waters of the Hudson river between Hammond (11th) street on the south and 135th street on the north, and between the westerly boundary of the 400 foot strip, above referred to, on the east, and the westerly boundary of Thirteenth avenue on the west. Section 4 gave to the owners of adjoining uplands certain pre-emptive rights in the lands under water.

In 1837 the city was, therefore, the owner of the lands extending from high-water mark to Thirteenth avenue, subject to the legislative command that the streets enumerated in the statute, among which were Forty-second and Forty-third streets, "shall be continued and extended westerly along the present lines thereof from their present terminations * * * to the said Thirteenth Avenue."

Pursuant to the plans outlined in the act of 1837 the city, in 1837 and 1838, acquired the uplands necessary to open Forty-third street from high water at the East river to high water at the Hudson river.

In 1844 an ordinance was passed providing for the creation of a sinking fund for the redemption of the city debt and regulating the powers of the commissioners of the sinking fund. It authorized the sale, by the commissioners, of such corporate lands only as were not reserved for the public use (sec. 17) and directed that all grants thereof should contain the usual covenants in relation to streets and avenues passing through them; and for the building and maintenance of bulkheads and wharves and the collection of wharfage, etc. This ordinance was confirmed by the legislature in the enactment of chapter 225, Laws of 1845.

In 1848, 1849 and 1850 Caleb F. Lindsley became the owner of the uplands east of high-water mark on the Hudson river between Forty-second and Forty-third streets.

The foregoing chronological recital of events now brings us to the deeds upon the construction and effect of which the rights of the parties directly depend.

In 1850 the city of New York, by two separate grants, conveyed to Lindsley the lands under water between Forty-second and Forty-third streets, subject to the covenants expressed in the deeds. The city reserved out of the premises granted so much thereof as formed parts of Twelfth and Thirteenth avenues and Forty-third street. The lines and boundaries of the lands granted were referred to as particularly described and designated on a map which was attached to, and made a part of, the deeds. This map shows the avenues and streets mentioned in the deeds as laid out under the plan of 1807 as amended in 1837. The grantee covenanted, upon request or direction of the grantor, to construct bulkheads and streets, to make pavements and sidewalks, and to keep them in repair for the use of the general public. The grantee further covenanted that said streets and avenues should forever remain public streets for the use of the public, the same as other streets in the city.

The grants of 1850 to Lindsley were followed by another grant to him in November, 1852, of the pier in controversy. This last grant was made pursuant to a resolution of the board of aldermen and the commissioners of the sinking fund, to the effect that the pier at the foot of Forty-third street, with the extent of the present width of the street, be sold to Lindsley for the consideration of \$8,000.00, and the description in the deed was as follows: "Beginning at the point formed by the intersection of the northerly side of 43rd street with the easterly line or side of 12th Avenue; running thence southerly along the easterly side of 12th Avenue to the northerly side of said pier; thence westerly 211 feet three inches; thence southerly 40 feet five inches; thence easterly 212 feet two inches, to the easterly side of the 12th Avenue, and thence southerly to a point where the southerly side of 43rd street intersects the said 12th Avenue. Together with the extent of the present width of the street with the right of wharfage thereon, and together with all and singular the tenements, hereditaments," etc., subject, however, to the right of the city to order the pier extended into the river at

the expense of Lindsley, or to extend the pier at the city's expense, or to grant the right to do so to other parties if Lindsley should fail to make such extension when directed so to do, "in which case the right to wharfage, etc., at the portion of the pier extended shall belong to the parties at whose expense the extension shall be made."

The grants above referred to were followed by the creation of the department of docks in 1870 with authority to adopt a system of water-front improvements, and in 1871 that department adopted a plan which was thereafter approved and adopted by the commissioners of the sinking fund. Under this plan a new bulkhead or exterior line was established considerably east of Thirteenth avenue and 150 feet west of the westerly side of Twelfth avenue.

In 1873 the city granted to the plaintiff, which by various mesne conveyances had acquired Lindsley's title to the pier in 43d street, a permit to extend and widen the pier. Under this permit the plaintiff agreed to pay an annual rental of \$100.00 for the land occupied by the extension, and to waive all claims for damages in case the city should take the land covered by the extension for permanent water-front improvement.

Pursuant to the plan adopted by the city authorities the pier was, in 1873, widened and extended outward about 300 feet beyond the westerly end of the old pier.

In December, 1890, the department of docks adopted a resolution directing the defendant, the Forty-second Street Railroad Co., which by various mesne conveyances had acquired title to the land below high-water mark next south of the pier, to construct a bulkhead or sea wall between the middle line of 43rd street and the middle line of 42nd street on the North (or Hudson) river, and to do the necessary filling in, according to the plan adopted by the city authorities in 1871.

Thereupon, in 1891, this action was commenced. This event was followed by a number of others of historical interest, but of no important bearing upon the disposition which we think must be made of this case.

We proceed at once, therefore, to consider the effect of the conveyance under which the plaintiff claims title, and this necessitates an occasional reference to some of the proceedings above enumerated.

There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First.* The title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. (*Sage v. Mayor, etc., of N. Y.*, 154 N. Y. 70; *Matter of City of New York*, 168 N. Y. 139.) *Second.* The title of the city of New York in and to the lands within its public streets is held in trust for the public use. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Kane v. N. Y. El. R. R. Co.*, 125 N. Y. 165.) *Third.* The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure. (*People v. Lambier*, 5 Denio, 9; *Matter of City of Brooklyn*, 73 N. Y. 179.) *Fourth.* It was competent for the legislature in granting additional submerged lands to the city of New York in 1837, to prescribe that such lands should be used for the purposes of an exterior street, to which other streets then intersecting the river should be extended.

In the light of these observations let us consider again the situation as it was in 1850 and 1852 when the grants to Lindsley were made. By the act of 1837 the legislature had directed that Forty-third street "shall be" extended to Thirteenth avenue. The title to the lands within the lines of Forty-third street and below high-water mark, being then in the city of New York, this legislative command was in effect an immediate application of such lands to the purpose for which the grant of 1837 was made. The almost immediate

institution of condemnation proceedings to acquire the uplands necessary to actually open Forty-third street to high-water mark was a distinct recognition of the city's duty in the premises, and when those proceedings were completed in 1838 they carried with them the public right of access to the river, either at high-water mark or at the end of the pier if it was then in existence. If the pier was not then in existence, the same result was, of course, accomplished when it was built. (*People v. Lambier* and *Matter of City of Brooklyn*, *supra*.)

The deeds of 1850 were taken by Lindsley under covenants which expressly provided for the continuance of the streets and avenues laid out on the Smith map of 1837, and under constructive knowledge of the limitations which the ordinance of 1844, as confirmed by the act of 1845, had placed upon the powers and duties of the commissioners of the sinking fund.

What, then, was the effect of the deed of 1852? The grantee therein named was the same as in the deeds of 1850. He had actual knowledge of the covenants expressed in those deeds, and was chargeable with constructive notice of the public character of the property described in the deed of 1852, the public trusts upon which it was held by the city, and the limitations upon the powers of municipal officers in respect of such property. (*Donovan v. Mayor, etc., of N. Y.*, 33 N. Y. 291; *Lyddy v. Long Island City*, 104 N. Y. 219.) In addition to this, the description in the grant did not inclose the interior or shore end of the pier. The city expressly reserved the right to order the pier extended by the grantee, or, in case of his failure to comply with such order, to make the extension itself or through others to whom it might grant the right, and, in the latter event, the rights of wharfage, etc., were to belong to those who made the extension. These things are not only inconsistent with the idea that the grant of 1852 conveyed an absolute fee, but they speak with most persuasive force of the real purpose and effect of the grant, which was to convey to the grantee the right to maintain a pier, and to collect wharfage, etc., at the foot of Forty-third street in the Hudson river, wherever that point should be located by law-

N. Y. Rep.] Opinion of the Court, per WERNER, J.

ful authority. It was the incorporeal hereditament attached to the fee, and not the fee itself, that was conveyed. Under this construction of the grant the rights of all concerned are recognized and preserved. The city holds the title which it never had the right to alienate. The plaintiff, as the grantee's successor in title, has the right to follow the lawful extension of Forty-third street for the purpose of maintaining a pier and collecting its revenues. The Forty-second Street R. R. Co., as successor to the title, rights and obligations of the grantee under the deeds of 1850, can perform the covenants of these deeds and reap the benefits which may accrue therefrom.

This construction of the grant of 1852 is, moreover, in harmony with our decision in the case of *Langdon v. Mayor, etc., of N. Y.* (93 N. Y. 129), to the effect that a grant of the right of wharfage is property, the possession of which can only be resumed by the state or municipality, by due process of law and upon proper compensation. Thus, it will be seen, that whatever the rights of the plaintiff may be in matters of substance or procedure, it cannot maintain this action, for it is predicated upon an alleged title in fee that does not exist, and ignores the covenants which effectually bar the relief herein prayed for. Having arrived at this conclusion it is neither necessary nor pertinent to suggest what other proceedings may, or should be, instituted by the plaintiff, for such other proceedings may be affected or controlled by some of the events which have transpired since 1873, but which have no legitimate bearing upon the case now before us.

The judgment of the court below should be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN and CULLEN, JJ., concur.

Judgment affirmed.

LEHIGH VALLEY RAILWAY COMPANY et al., Appellants, v.
ROBERT B. ADAM et al., Constituting the Grade Crossing
Commissioners of the City of Buffalo, Respondents.

BUFFALO (CITY OF) — POWER OF COMMISSIONERS UNDER GRADE CROSSING ACTS TO CHANGE GENERAL PLAN. Under the Buffalo Grade Crossing Acts (L. 1888, ch. 345; L. 1890, ch. 255; L. 1892, ch. 353) providing that: 1. The general plan to be adopted may be amended only in matters of detail. 2. It shall not be extended beyond the general plan heretofore adopted under which contracts have been entered into. 3. Contracts heretofore or hereafter made with railroad companies may be changed by agreement between the contracting parties, but not otherwise — where the commissioners in March, 1893, adopted a general plan which provided for no change in the grade of a railroad running through the city as then constructed and operated, they cannot compel the railroad company to change the elevation of its tracks and reconstruct its terminal structures, sidings and switches to comply with a plan proposed and adopted in 1899, which is an extension of the general plan of 1893, and not a modification, in some details, of that plan.

Lehigh Valley Ry. Co. v. Adam, 70 App. Div. 427, reversed.

(Argued October 26, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 18, 1902, upon an order reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and granting a new trial.

This action was brought to obtain an injunction to restrain the defendants from proceeding to compel the plaintiff railway company to elevate a part of its road in the city of Buffalo and to reconstruct its freight and passenger terminals.

The facts, so far as material, are stated in the opinion.

Martin Carey and *James McC. Mitchell* for appellants. The respondent grade crossing commissioners have no authority, under the statute, to compel the elevation of three-quarters of a mile of the main line of the appellants' railroad and the reconstruction of its freight and passenger terminals as pro-

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posed. (*Power v. Vil. of Athens*, 99 N. Y. 592; *Matter of Breslin*, 45 Hun, 210; *People v. O'Brien*, 111 N. Y. 1; *Milbau v. Sharp*, 27 N. Y. 611; *Davis v. Mayor, et al.*, 14 N. Y. 506; *People v. Sturtevant*, 9 N. Y. 263.)

Spencer Clinton for respondents. The commissioners are not restricted by their contract with the railway company, made in 1888, from amending their plan so as to compel the company to raise its tracks. (*Cleveland v. City of Augusta*, 102 Ga. 233; *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U. S. 556; *W. R. R. Co. v. Defiance*, 167 U. S. 88; *C., B. & Q. R. R. Co. v. Nebraska*, 170 U. S. 57.)

WERNER, J. The grade crossing commission of the city of Buffalo is a body of statutory creation and jurisdiction. (Ch. 345, L. 1888; Ch. 255, L. 1890; Ch. 353, L. 1892.) The question before us is whether that body had jurisdiction in 1899 to impose upon the Lehigh Valley Railway Company the burden of elevating its tracks in accordance with the plan then adopted. The answer to that question is to be found in the statute (Ch. 353, L. 1892), which is the latest legislative grant of power to the commission, and which provides that the commissioners "shall adopt a general plan for the relief of the city from the present and prospective obstructions of the streets of the city by railroads crossing the same at grade and may from time to time alter, amend, or modify the same as to any detail, but said general plan, when adopted, shall not extend beyond the general plan heretofore adopted by said commission under which contracts have already been entered into, nor shall the same be extended; they may make contracts on behalf of the city with any railroad company or companies to carry out the purpose of this act, and may, by agreement with the contracting company, alter, modify or change any contract heretofore or hereafter made by them."

This statute contains three emphatic limitations: 1. The general plan to be adopted may be amended only in matters of detail. 2. It shall not be extended beyond the general plan

heretofore adopted under which contracts have been entered into. 3. Contracts heretofore or hereafter made with railroad companies may be changed by agreement between the contracting parties, but not otherwise. Under this statutory authority, thus limited, the commission, in November, 1893, adopted a general plan which provided for no change in the grade of the Lehigh Valley Railway Company as then constructed and operated, and which left undisturbed the street crossings at grade over its right of way.

What was the physical situation of the Lehigh Valley Railway Company when the general plan of 1893 was adopted? It came into and ran through the city of Buffalo above grade to a point east of Louisiana street, where it descended to grade and thus crossed the latter street and Chicago street; thence along the bed of Scott street to Michigan street, crossing the same at grade and then over its own property to its terminal station at Washington street. This has been the unchanged physical condition of the right of way of that railroad in the city of Buffalo from 1882, when it first began to operate, with the single exception that in 1888, after the passage of the first Grade Crossing Act, and after the adoption of the first general plan by the grade crossing commission, the grade at the Michigan street crossing was slightly changed to conform to the plan for a viaduct over other railroads. This change was made pursuant to the contract of November, 1888, between the commissioners and the railway company.

What was the change proposed under the plans and procedure of the commission in 1899? It involved the elevation of the Lehigh tracks over a distance of three-fourths of a mile upon a structure of stone and iron or steel. In effect, it also required the reconstruction of its terminal structures, sidings and switches. The most cursory glance at the proposed plans discloses the magnitude and importance of the projected change.

Was this proposed change a mere amendment in some detail of the general plan of 1893, or was it a substantial extension

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of the plan? The undisturbed findings of fact of the trial court present a conclusive answer to this question. The trial court has specifically found that the proposed change is an extension of the engineers' plan of 1888, of the general plan of 1888 under which the contract of that year between the plaintiff and defendant was entered into, and of the general plan of 1893.

The reversal by the Appellate Division of the judgment entered upon that finding must be presumed to have been based upon questions of law (Sec. 1338, Code Civ. Pro.), so that the fact as found by the trial court must stand for the purposes of this review. If we go a step further, however, and concede for the purposes of the argument that what is called a finding of fact is really a conclusion of law, we cannot escape the conviction that it was sound and just as applied to the conceded facts of the case. We think that the learned trial court was right in holding that the proposed plan for the elevation of the Lehigh Valley Railway Company's tracks in 1899 was an extension of the general plan of 1893, and that the learned Appellate Division erred in deciding that it was a mere modification, in some detail, of that previous plan.

This view necessarily leads to the conclusion that the commissioners were without power to impose upon the Lehigh Valley Railway Company the burden of changing its railroad to conform to the proposed plan of 1899.

Since the question before us is not whether such power could have been, or can be, granted by the legislature, but simply whether it was granted under the acts above referred to, we may here properly end the discussion of the subject by stating that the judgment of the Appellate Division must be reversed, and that of the trial court affirmed, with costs to the plaintiff in all courts.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and CULLEN, JJ., concur.

Judgment reversed, etc.

FANNY F. WALLACE et al., as Executors of EDWIN R. WALLACE, Deceased, Appellants, v. WILLIAM McECHRON et al., Respondents, Impleaded with Others.

1. PARTITION — PARTIES. One claiming title in hostility to the plaintiff in an action of partition may properly be made a party defendant.

2. TAX — WHEN STATE TAX DEED VOID FOR FAILURE OF COMPTROLLER TO GIVE STATEMENT OF UNPAID TAXES ON LAND WHEN REQUESTED BY OWNER. Where the default of a taxpayer was caused by the failure of the state comptroller or his clerks to render a proper statement of the unpaid taxes, a subsequent deed executed by the comptroller in 1886 and recorded in 1887 in pursuance of a tax sale made in 1871 for the unpaid taxes omitted from the statement cannot divest the owner of his title.

3. SECTION 132 OF THE TAX LAW RELATING TO EFFECT OF FORMER DEEDS NOT APPLICABLE. Section 132 of the Tax Law (L. 1896, ch. 908), providing that a comptroller's deed which has been recorded for two years shall be conclusive evidence that the sale and proceedings prior thereto were regular and that conveyances shall be subject to cancellation, (1) by reason of the payment of such taxes; (2) by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid; (3) by reason of any defect affecting the jurisdiction upon constitutional grounds, if application is made to the comptroller or an action is brought, in the case of all sales made prior to 1895, within one year from the passage of the act, is not applicable to such a case whether treated as a statute of limitation or as a curative act, and, therefore, the fact that the owner failed to apply for a cancellation or to bring an action within the prescribed time, does not preclude him from thereafter asserting his title in an action for a partition of the property.

Wallace v. International Paper Co., 84 App. Div. 88, reversed.

(Argued October 28, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 12, 1903, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Homer Weston for appellants. The comptroller's certificate of the amount of taxes due in the statement to Munn

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and the proper receipt therefor in full, given on due request and in obedience to a statute requiring it, created an estoppel against the comptroller and those in privity with him. (*Breisch v. Coxe*, 81 Penn. St. 336; *Randall v. Dailey*, 66 Wis. 285; *People ex rel. v. Registrar, etc.*, 114 N. Y. 19; Blackwell on Tax Titles [5th ed.], § 830; *M. L. Ins. Co. v. Corey*, 135 N. Y. 326; *People v. Stephens*, 71 N. Y. 527; *Thompson v. Simpson*, 128 N. Y. 270; *M. & T. Bank v. Hazard*, 30 N. Y. 226; *Trustees v. Smith*, 118 N. Y. 634; *Weyh v. Boylan*, 85 N. Y. 394; *Blair v. Wait*, 69 N. Y. 113.) Plaintiffs have not lost their rights because of failure to comply with the provisions of section 132 of the Tax Law. (*Higgins v. Crouse*, 147 N. Y. 411; *Parmenter v. State*, 135 N. Y. 154; *Zink v. McManus*, 121 N. Y. 259; *Hayner v. Hall*, 159 N. Y. 553; *Gilbert v. Ackerman*, 159 N. Y. 124; *Colon v. Lisk*, 153 N. Y. 188; *Andrus v. Wheeler*, 29 Misc. Rep. 412.)

George N. Ostrander for respondents. Assuming that the comptroller did render appellants' grantor a defective tax bill, the state was not thus estopped from collecting the unpaid tax. (*People ex rel. v. Supervisors*, 29 Hun, 185; 93 N. Y. 397; *People ex rel. v. Barnes*, 114 N. Y. 317; *Flynn v. Hurd*, 118 N. Y. 27; *Parmenter v. State*, 135 N. Y. 155; *Peck v. State*, 137 N. Y. 372; *State v. Brewer*, 64 Ala. 287; *Pulaski v. State*, 42 Ark. 118; *Atty.-Gen. v. Mann*, 55 Mich. 445.) The Statutes of Limitation operate to secure defendant's tax title, and are a bar to this action. (*People v. Turner*, 117 N. Y. 227; *Ostrander v. Darling*, 127 N. Y. 70; *Ensign v. Barse*, 107 N. Y. 329; *People v. Turner*, 145 N. Y. 457; *Marsh v. N. P. Assn.*, 25 App. Div. 34; *People v. Turner*, 18 U. S. Sup. Ct. 38; *S. L. & T. Co. v. Roberts*, 83 Fed. Rep. 436; *Morgan v. Turner*, 35 Misc. Rep. 399; Cooley on Const. Lim. [6th ed.] 450; *Parmenter v. State*, 135 N. Y. 154; *People ex rel. v. Roberts*, 162 N. Y. 371.)

CULLEN, J. The action was brought for the partition of a tract of eleven hundred acres of wild lands in the county of

Hamilton. The complaint alleged that the plaintiffs were seized of two undivided thirds of the lands in question, the defendant The International Paper Company of the other third, and that the defendant William McEchron, the respondent on this appeal, claimed some interest therein. On the trial the plaintiffs deduced their title through several mesne conveyances and wills from a conveyance by the state in 1845. The respondent traced his title from a deed from Alfred C. Chapin, comptroller, to Warren Curtis and Benjamin F. Baker, December 29th, 1886, and recorded in the office of the clerk of Hamilton county on February 7th, 1887, executed in pursuance of a sale of the lands made in 1871 for the non-payment of a tax for \$1.17 imposed in the year 1862 for the construction of a highway through Herkimer, Hamilton and Lewis counties directed to be laid out by chapter 347 of the Laws of 1853, as amended by chapter 451 of the Laws of 1859. The counsel for the appellants claims to have established on the trial that such tax was actually paid by the plaintiffs' predecessor in title. But the trial court found to the contrary, and that finding having been unanimously affirmed by the Appellate Division, is conclusive upon us. The trial court, however, further found that in November, 1886, one Munn, then the mortgagee or owner, applied to the comptroller of the state for a statement of the unpaid taxes upon the property and that the comptroller rendered one to her which "purported to contain a statement of all taxes due on said property, but in fact did not contain a statement of said road tax." Munn paid all the taxes so returned to her by the comptroller and obtained from him a receipt in full. Without narrating the other facts in the case it is sufficient now to say that the trial court held that the record of the comptroller's deed to Curtis and Baker and the failure of the plaintiffs to bring any action or proceeding to cancel or annul the same within one year operated under the provisions of section 132 of the Tax Law (Chap. 908, Laws of 1896) to bar and divest all the plaintiffs' rights.

The practice of the appellants in making the respondent a

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party to the action, although he claimed in hostility to them, is justified by the decision of this court in *Satterlee v. Kobbe* (173 N. Y. 91). While under the findings of the trial court we must assume that the road tax was not paid, it appears that the failure to pay it was occasioned by the neglect of the comptroller or his clerks to return its amount to the owner on her request. It was made the duty of the comptroller under section 27 (Art. 2, chap. 13, title 3) of the Revised Statutes to give any person requesting it a statement of the tax, interest and charges due on any piece of land. It has been decided by this court that where the default of the taxpayer is caused by the failure of the public officer or his clerks to render a proper statement of the unpaid taxes, a sale made for unpaid taxes omitted from the statement cannot divest the owner of his title. (*Van Benthuyssen v. Sawyer*, 36 N. Y. 150; *People ex rel. Cooper v. Registrar of Arrears*, 114 N. Y. 19.) The sale of the lands to Curtis and Baker was, therefore, void as against the plaintiffs, and we are thus brought to a consideration of the effect of the record of the comptroller's deed under section 132 of the Tax Law.

The learned courts below based their determination of the case on the decisions of this court in *People v. Turner* (145 N. Y. 457) and *Meigs v. Roberts* (162 N. Y. 371). Those cases involved the construction and effect not of the statute now before us but of earlier enactments of a somewhat similar character. Such statutes have been viewed by this court both as curative acts and as statutes of limitations. It is to be observed, however, that none of them has been enacted in the ordinary form either of a curative act or of a statute of limitations. In terms they provide that after a certain lapse of time and in certain contingencies a comptroller's deed shall be conclusive evidence of certain facts. It, therefore, becomes necessary when any case involving the construction and effect of one of these statutes is presented to closely scrutinize and carefully analyze the statute to see whether as to such case the statute applies, and if applicable, whether its operation is that of a curative act or of a statute of limitations. In

the *Turner* and *Roberts* cases the operation of the statute there under review was prospective, and it was held that the acts were statutes of limitations. In the present case the contrary is the fact; the comptroller's deed and its record were prior to the enactment of the Tax Law. It is elementary constitutional law that while the legislature may shorten the time allowed for the prosecution of claims or assertion of rights, even as to claims and rights existing at the time, it must leave a reasonable time after the enactment of such a law in which such rights and claims may be asserted and enforced. A contrary rule would enable the legislature to arbitrarily transfer the property of one person to another. The first part of section 132 of the Tax Law provides that every conveyance theretofore executed by the comptroller, which has been recorded for two years in the office of the proper county clerk, shall be conclusive evidence that the sale and proceedings prior thereto were regular.

Had the section stopped at this point no one would contend that the law could be upheld as a statute of limitations. It could only operate as a curative act subject to all the limitations on the power of the legislature to pass such an act that are pointed out in the case of *Meigs v. Roberts*. The section then proceeds: "But all such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the comptroller, or in an action brought before a competent court therefor; provided, however, that such application shall be made, or such action brought, in the case of all sales held prior to the year eighteen hundred and ninety-five, within one year from the passage of this act." The counsel for the respondent contends that by these later provisions the appellants were given one year in which to bring the proper action for the enforcement of their rights and the

assertion of their title. If this were the fact then it might well be argued that the act operated as a statute of limitations and the question would be presented whether the time allowed was reasonable and whether it could apply in favor of a claimant who had not entered into possession. But the difficulty with this statute lies just here. It does not give an owner for the term of one year after the passage of the act an unqualified right to institute an action or proceeding to cancel the hostile tax sale or deed, but only to assail it on three grounds specified: 1. That the taxes have been paid; 2. That the town or ward had no legal right to assess the land; 3. A defect affecting the proceeding on constitutional grounds. Now, it happens that the thing which we hold rendered the tax sale void in the present case falls in neither of the three classes. Therefore, it follows that so far from having a year the plaintiffs never had an instant after the statute went into effect in which to assert or enforce their rights. It would require neither great ingenuity nor much reflection to suggest many other grounds that would render a tax sale void, yet would not be included in the cases specified in the statute. Whether with the right to bring an action being thus restricted and qualified, section 132 of the Tax Law can be held to operate in any respect as a statute of limitations in the case of past conveyances it is unnecessary to determine; it is obvious that it can have no such effect as against the right or claim of the plaintiffs which was excluded from enforcement by such restrictions.

The law if treated as a curative act is no more efficacious. While the legislature may by subsequent enactment cure defects or irregularities in proceedings to impose a tax if they relate to requirements that the legislature might in the first instance have dispensed with, where the proceedings are so fatally defective that no title passes, it cannot by a curative act transfer the title of one person to another. (*Cromwell v. MacLean*, 123 N. Y. 474; *Joslyn v. Rockwell*, 128 N. Y. 334.) As these views dispose of the present appeal and may dispose of the entire litigation, we deem it unnecessary to dis-

cuss the other serious grounds of attack on the judgments below.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

PARKER, CH. J., GRAY, O'BRIEN, MARTIN and WERNER, JJ., concur; HAIGHT, J., not sitting.

Judgment reversed, etc.

WILLIAM P. KNOWLES, Appellant, *v.* THE CITY OF NEW YORK
et al., Respondents.

1. PLEADING—INSUFFICIENCY OF GENERAL ALLEGATION OF FRAUD. General allegations of fraud are of no value in stating a cause of action; the facts or intent must be stated in such a manner that the court may see whether they were fraudulent or not.

2. NEW YORK CITY—POWER OF NEW EAST RIVER BRIDGE COMMISSIONERS—L. 1895, CH. 789—PROVISIONS IN SPECIFICATIONS LIMITING COMPETITION NEITHER ILLEGAL NOR FRAUDULENT. General allegations in a taxpayer's action to annul a contract made by the commissioners of the New East River bridge in the city of New York for the construction of the bridge, that the commissioners fraudulently prescribed in their notices and specifications that proposals would be received from those bidders only who possessed plants requisite to do the work and whose plants had been in successful operation for at least one year, and that there would be excluded steel containing more than a specified percentage of foreign elements "with the purpose and intent of limiting competition and confining the same to a small class of bidders," and also charging that the cost of the work was increased thereby, in the absence of any allegations of fact except the statement that their action was taken with the purpose and intent of limiting the class of bidders, are insufficient to support the charge of fraud, since under the act directing the construction of the bridge (L. 1895, ch. 789, § 3) the power of the commissioners, which was not limited or qualified by subsequent charter provisions, was plenary and they were not limited to the performance of the work by contract or by competition, and, therefore, their intent to limit competition, both in the class of construction or as to character of material, was in itself neither illegal nor fraudulent.

3. INSERTION OF INVALID PROVISIONS OF LABOR LAW DOES NOT RENDER CONTRACT VOID. The fact that the commissioners required the insertion of provisions of the Labor Law in the contract which were subsequently held invalid, even if their action was illegal, does not make it fraudulent,

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and the insertion of such provisions in the contract does not render it void assuming that they increased the cost of the work; the contract may be enforced, although but partially performed, especially as the commissioners, if the invalidity of such provisions avoided the contract, might have immediately, without competition or advertisement, entered into a new contract with the same contractor, and they, therefore, had power to waive illegal conditions and to continue the contract in force.

Knowles v. City of New York, 74 App. Div. 632, affirmed.

Knowles v. Pennsylvania Steel Co., 77 App. Div. 643, affirmed.

(Argued October 27, 1903; decided November 10, 1903.)

APPEAL from a judgment entered August 25, 1903, upon orders of the Appellate Division of the Supreme Court in the first judicial department which affirmed an interlocutory judgment of Special Term overruling a demurrer to the answer of the defendants other than the Pennsylvania Steel Company, reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint by the defendant Pennsylvania Steel Company, and directed that the complaint be dismissed as to all of the defendants.

The nature of the action and the facts, so far as material, are stated in the opinion.

L. Laflin Kellogg and *Alfred C. Petté* for appellant. The facts alleged in the complaint constitute a good and sufficient cause of action under the Taxpayers' Statute. (*Bush v. O'Brien*, 164 N. Y. 205; *People ex rel. v. Featherstonhaugh*, 172 N. Y. 126; *Davenport v. Walker*, 57 App. Div. 221; *Meyers v. City of New York*, 58 App. Div. 534; *Adams v. Brennan*, 117 Ill. 199; *Meyers v. P. S. Co.*, 77 App. Div. 307; *Poindexter v. Greenhow*, 114 U. S. 270; *Norton v. Shelby County*, 118 U. S. 425; Mechem on Pub. Off. § 662; Cooley on Const. Lim. [6th ed.] 222; *People ex rel. v. Nixon*, 158 N. Y. 221; *People ex rel. v. Gleason*, 121 N. Y. 631; *Davenport v. Walker*, 57 App. Div. 221.)

William C. Trull and *Delos McCurdy* for the Pennsylvania Steel Company, respondent. The complaint does not state

facts sufficient to constitute a cause of action. (*People ex rel. v. Coler*, 56 App. Div. 98; 166 N. Y. 1; *People ex rel. v. Coler*, 166 N. Y. 144; *Calhoun v. Millard*, 121 N. Y. 69; *Talcott v. City of Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 N. Y. 242; *Robinson v. Gilroy*, 30 N. Y. Supp. 411, 413; *N. Y. C. & H. R. R. Co. v. Maine*, 24 N. Y. Supp. 963; *Paul v. City of New York*, 46 App. Div. 69.) The contracts in question having been entered into in good faith and partially performed, the city and the commissioners are bound by the contracts, and, having received benefits therefrom, are estopped from questioning their validity. (*Bissell v. M. S. R. R. Co.*, 22 N. Y. 265; *W. A. Co. v. Barlow*, 63 N. Y. 62; *Mayor v. Sonneborn*, 113 N. Y. 423; *City of Buffalo v. Balcom*, 134 N. Y. 532, 536; *B. G. L. Co. v. Claffy*, 151 N. Y. 24; *Bush v. O'Brien*, 164 N. Y. 221, 222; *Alexander v. Donohue*, 143 N. Y. 203; *People ex rel. v. Coler*, 166 N. Y. 1.) The objection that the contracts are illegal because of the insertion therein of the provisions of the Labor Law is not available to the plaintiff. (L. 1895, ch. 789; L. 1896, ch. 612; *People v. B. F., etc., Ry. Co.*, 89 N. Y. 75.) Broad as are the provisions of the Taxpayers' Act, and liberally as it should be construed, it was never intended to confer upon the taxpayer the right or authority to exercise the discretion which is vested in the bridge commissioners or the municipality of the city of New York, to determine whether or not it is for the interest of the public to insist upon the invalidity of a particular covenant in a contract. (*People ex rel. v. Coler*, 56 App. Div. 98.)

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for the City of New York et al., respondents. The complaint does not state facts sufficient to constitute a cause of action. (*B. G. L. Co. v. Claffy*, 151 N. Y. 24; *Bush v. O'Brien*, 164 N. Y. 215; *Calhoun v. Millard*, 121 N. Y. 169.) The plaintiff's demurrer to the answer interposed by these defendants was properly overruled. (*Hull v. Fly*, 2 Abb. [N. C.] 440; *Kimball v. Hewitt*, 15 Daly, 124; *Coombs*

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v. *Pitt*, 3 Burr. 1423; *Commonwealth v. Churchill*, 5 Mass. 174; *Waters v. Jones*, 13 Wall. 680; *Tippecanoe Co. v. L. R. R. Co.*, 50 Ind. 118.)

CULLEN, J. As to the practice in this case it is sufficient to say that the judgment under review proceeded on the ground that the complaint did not state a good cause of action and the only question presented to us is the sufficiency of that complaint. The action is brought by a taxpayer of the city of New York against the city, the commissioners of the East River Bridge and the Pennsylvania Steel Company to declare void a contract entered into between the said commissioners and the company for the construction of the approaches to the bridge; to enjoin the continued performance of said contract and the further payment of any moneys on account thereof and to recover the moneys thitherto paid thereon. The complaint sets forth the act of the legislature authorizing the construction of the bridge (Chap. 789, Laws 1895); the appointment of certain of the defendants as commissioners under the provisions of the act; the advertisement by said commissioners for sealed proposals or bids for the construction of the steel and masonry approaches to the suspended structure of the bridge; the specifications of the work to be done and the material to be furnished; the terms and conditions of the contract into which the successful bidder would be required to enter; the receipt of several proposals from various bidders and the amounts of their respective bids; the award of the contract to the defendant, the Pennsylvania Steel Company, and the execution of the contract in pursuance of such award, and the entry of such company upon the performance of said contract. The legality of the contract is assailed on several grounds stated in the complaint. *First*, it is alleged there were discrepancies in the notices furnished to the contractors. In some of the notices it was stated that a certified check for six thousand dollars must accompany the proposals and that the successful bidder would be required to execute a bond in the penalty of two hundred thousand dollars for the perform-

ance of the contract. In others the amount of the certified check was given as twelve thousand dollars and that of the bond as four hundred thousand dollars. *Second.* The notice contained the following provision: "As by far the greater part of this work can be executed only by bridge establishments of the first class, bids will be received only from such parties as have the requisite plant and facilities which have been in successful operation on work of similar character for at least one year. The bidders must be, in the opinion of the commissioners, fully qualified, both by experience and in appliances, to execute work of this character and importance according to the highest standard of such work at the present time." *Third.* The specifications prescribed that the finished steel to be furnished under the contract should not contain to exceed .06 of one per cent of phosphorus, .04 of one per cent of sulphur, .80 of one per cent of manganese and .35 of one per cent of silicon. *Fourth.* That the specifications and contract required the contractor to comply with the provisions of the Labor Law (Chap. 415, Laws 1897) requiring the contractor to pay the prevailing rate of wages, to employ his laborers only eight hours a day, and to use only stone cut within the state of New York. The only allegation of fraud in the complaint is the following: "*Fourteenth* — Upon information and belief, that the said contracts and specifications and the said advertisement for bids and proposals for the doing of said work were fraudulently prepared and issued, and the said requirements of said advertisements that bids would be received only from parties having the requisite plant and facilities which had been in successful operation on work of similar character for at least one year, and of the specification providing that the finished steel should not contain to exceed .06 of one per cent of phosphorus, .04 of one per cent of sulphur, .80 of one per cent of manganese, and .35 of one per cent of silicon were unreasonable and unfair, and were fraudulently prepared and issued with the purpose and intent of limiting competition and confining the same to a small class of bidders, and did limit competition

and confine the same to a small class of bidders, thereby increasing the cost of the work as by said requirements, although competent and reliable bidders with the requisite plant and facilities desired to submit bids and proposals for the doing of said work, they were prevented from so doing unless their plant and facilities had been in successful operation on work of a similar character for at least one year; that the requirement in the specification as to the elements of finished steel tended to, and actually did increase the price of the work, because it prohibited the furnishing of steel by any other company than the Carbon Steel Company, whose steel alone meets the requirements and conditions of said specifications, although steel manufactured by other companies than said Carbon Steel Company is equally good and well adapted for the purposes of said proposed work." It is also charged by the complaint that the provisions concerning the Labor Law increased the cost of the work.

The commissioners for building the bridge did not derive their powers, duties and authority from the charter but from the special act of the legislature which provided for the construction of the bridge. At the time of the commencement of the work New York and Brooklyn were separate municipalities. The Greater New York charter of 1897 which consolidated the two cities did not in any way repeal or modify the act of 1895 directing the construction of the bridge. The prosecution of the work still continued under the commissioners appointed for the purpose until by the revised charter of 1901 (§ 595, subd. 5) the board of commissioners was abolished and its powers and duties devolved upon the commissioner of bridges of the city of New York. It was properly held by both the courts below that the power of the commissioners in the construction of the bridge was, under the statute, plenary and not limited or qualified by charter provisions concerning the letting of contracts. This was necessarily so for several reasons. At the time the work was commenced the commissioners were not agents of a single municipality but of two cities whose charter provisions might conflict. Even

after consolidation the provisions of the New York charter relating to the letting of contracts were such as could not be made applicable without subjecting the conduct of the trustees to review and control by other city authorities, while the intent of the statute was to vest power and discretion in the construction work exclusively in the trustees. This was rendered necessary by the exceptional character of the work. Its magnitude was such as to prevent the work being let in a single contract, and the unforeseen difficulties which might be encountered would equally preclude such a course. While some parts of the work and much material might be the subject of separate contracts, still it might be necessary to do other parts by day's work. Speed in the construction of the bridge was of the greatest importance, not only because of the pressing public need for its use, but in view of the enormous interest account continually increasing as the work progressed. These considerations were appreciated by this court in the case of *People ex rel. Murphy v. Kelly* (76 N. Y. 475), a litigation which arose with reference to the New York and Brooklyn bridge. Though the successful construction of the first bridge doubtless solved many doubtful problems, the considerations referred to by the court in the *Kelly* case bear with almost equal force on the case now before us.

With this brief statement of the powers of the commissioners we may now review the charges against them found in the complaint. There is no allegation that the discrepancy in the notices issued to contractors in any way affected the bidding, nor is it alleged that it was other than a blunder and not the result of design; nor is there any allegation that the award of the contract to the steel company was made in bad faith. It is, however, charged that the commissioners fraudulently prescribed in their notices and specifications that proposals would be received from those bidders only who possessed plants requisite to the work and whose plants had been in successful operation for at least one year, and that there would be excluded steel containing more than a specified percentage of foreign elements, "with the purpose and intent of limiting

competition and confining the same to a small class of bidders;" and it is also charged that the cost of the work was increased thereby. While it is alleged that this action was had fraudulently there is no allegation of fact to support the charge, except the statement that it was made with the purpose and intent of limiting the class of bidders. "The mere general allegations of fraud or conspiracy are of no value as stating a cause of action." (*Wood v. Amory*, 105 N. Y. 278; *Van Weel v. Winston*, 115 U. S. 228; *Cohn v. Goldman*, 76 N. Y. 284; *Knapp v. City of Brooklyn*, 97 id. 520.) The plaintiff must state what the facts or intent were so that the court may see whether they were fraudulent or not, and his characterization of them as such is not sufficient. That the commissioners intended by the specifications to limit the class of bidders is unquestionable, and that they intended to limit the character of material to be furnished under the contract is equally unquestionable; but the imposition of such limitations so far from being fraudulent may have been dictated and presumably were dictated solely by regard for the advantage and interest of the municipality. As already said, the commissioners were not obliged to do the work or obtain the materials by contract, and if they did see fit to contract they were not bound to award the contract by competition. It was their duty to see that the material of which the structure was built was of such character as to secure safety and permanence, and this even though at an enhanced cost. It may be true, as stated in the complaint, that other steel just as good as that called for by the specifications could be secured at a less price, but the question of the kind of steel to be adopted was a question to be determined by the commissioners, not by the courts. So also the requirement that bidders should have a plant which had been in successful operation for at least a year might have been dictated by the wisest economy. Every one knows that delays are sure to occur in great public improvements. This very bridge, as well as its predecessor, is a particular example of that truth. The first bridge should have been finished long before it was and the present bridge

should have been finished long before now. A law suit against the sureties of a defaulting or incompetent contractor would be an insufficient compensation to the traveling public for the inconvenience, or to the municipality for its interest account running on at the rate of hundreds of thousands of dollars a year. Therefore, as the commissioners were not limited by the statute to performance of the work by contract or by competition, their intent to limit the competition both in class of contractors and in character of material was in itself neither illegal nor fraudulent. If it had been charged that the commissioners, knowing and believing that the restrictions and limitations imposed would not be conducive to the successful prosecution of the work and would be disadvantageous to the city of New York, had corruptly, with intent to benefit the steel company or some other favorite contractor, imposed these limitations, a different question would be presented. It is to be observed, however, that the plaintiff has carefully abstained from any charge of that character. These views also dispose of the objection to the commissioners' action in that they failed to award the contract to the lowest bidder.

We are now brought to the effect of the incorporation of the provisions of the Labor Law into the contract between the commissioners and the steel company. The contract was made before this court had rendered its decision in the case of *People ex rel. Rodgers v. Coler* (166 N. Y. 1), declaring the provisions of that statute unconstitutional. Before that decision both branches of the Supreme Court had upheld the validity of the law. (*Meyers v. City of New York*, 32 Misc. Rep. 522; affirmed on opinion below, 54 App. Div. 631.) It is doubtless true, as claimed by counsel for the respondent, that an unconstitutional statute is void and of no effect at the time of its enactment, not merely from the subsequent adjudication to that effect by the courts. It is also true that every one is presumed to know the law. But every one of sense knows that this presumption is not in strict accordance with the fact; that no one can know all the law, and that some apparently know almost no law. The presumption, however, obtains because it is necessary that it should

obtain for government to exist, otherwise the greatest ignorance would confer the greatest license. But while mistakes in the law will not relieve one from liability for his act, in cases where intent or good faith is the issue, the party's knowledge of the law may be material. (*United States v. Realty Co.*, 163 U. S. 427.) It is not pretended that in inserting these conditions in the contract the commissioners acted in bad faith or in the belief that the law was invalid. In the state of the judicial decisions at the time prudence would seem to have dictated that the commissioners should comply with the statute. Therefore, though it may be that the commissioners' action in this respect was illegal, corrupt it was not, nor is it charged to have been. In the *Rodgers* case, in which the provisions of the Labor Law, so far as they related to the action of municipalities, were declared unconstitutional, it was held, not that a contract imposing these conditions on the contractor was void, but that the contractor could violate them, and, notwithstanding such violation, recover his pay, not on a *quantum meruit*, the value of the work done, but the contract price. That decision controls the present case. The learned counsel for the appellant seeks to distinguish the cases in two respects. He contends, first, that in the *Rodgers* case there was no proof that the Labor Law provisions of the contract enhanced the cost of the work, while in the present one that fact is expressly charged in the complaint. The distinction is not well founded. The ground on which the decision in the *Rodgers* case proceeded was that the provisions of the Labor Law necessarily increased the cost of the work to the municipality and that the legislature was without power to impose upon the municipality and its taxpayers such a burden. The second distinction sought to be drawn is that in the *Rodgers* case the contract had been completed while here it has not. It is, however, charged in the complaint that the contractor had entered on the performance of the work and received payments on account of it from the city, which the plaintiff seeks to have returned. So far as the payments had been actually made the *Rodgers* case unquestionably governs

and the contractor cannot be required to restore them. But the principle of the *Rodgers* case seems equally applicable to the further execution of the contract. The contract is an entire one. The contractor, naturally, in the ordinary course of business has incurred expense in contemplation of performance of the whole contract. Payment only for the work done and materials furnished would not compensate it for the expenditures made or the obligations assumed. The difference in fact on which the counsel lays stress justifies no distinction in principle. We reiterate the language of Judge HAIGHT in *People ex rel. North v. Featherstonhaugh* (172 N. Y. 112): "But the contract in this case does not depend upon the Labor Law for its consideration. The provisions of that statute incorporated into the specifications are extraneous matters which have no material effect upon the main provisions of the contract, and cannot affect those provisions unless it may tend to increase the cost of the work. The contractors must be presumed to have known the law, and, consequently, to have known that the provision with reference to the rate of wages was unconstitutional. They are deemed, therefore, to have made their bid with this understanding, even independent of the notice which was given to them by the commissioners."

Though we rest our disposition of this branch of the case on the decision of *People ex rel. Rodgers v. Coler*, there is another ground on which the action of the courts below should be upheld. As already said, though the action of the commissioners in inserting in the contract the conditions of the Labor Law may have been illegal, it was not fraudulent or corrupt. If these provisions avoided the contract, still as the commissioners might immediately after the decision of this court declaring their illegality have without competition or advertisement entered into a new contract with the steel company upon the same terms and conditions, except those required by the Labor Law (a course which is by no means certain it would not have been prudent to take rather than to interrupt and delay the prosecution of the work), it is clear

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Points of counsel.

that they could have waived the illegal conditions. Hence it is not within the power of the taxpayer to cancel or annul a contract which the commissioners determined to continue in force.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN and WERNER, JJ., concur.

Judgment affirmed.

JENNIE T. B. BECKER, as Executrix of JAMES BRADY, Deceased,
Respondent, v. THE CITY OF NEW YORK, Appellant.

NEW YORK CITY — STREET IMPROVEMENT — WHEN CITY NOT LIABLE FOR DAMAGES CAUSED BY MISTAKES OF CITY SURVEYOR IN FIXING GRADES. Under a street improvement contract executed by the commissioner of public works of the city of New York pursuant to an ordinance directing the regulating and grading of an avenue, which contract provided that "a city surveyor will be employed by the parties of the first part to see that the work is completed in conformity to the profile and to ascertain and certify the quantity of work done. Said surveyor, at the request of the contractor, will be directed to designate and fix grades for his guidance during the progress of the work without charge, provided that the said parties of the first part shall not be liable for any delay or for any errors of said surveyor in giving such grades and said surveyor shall be considered as the agent of the contractor so far as giving such grades is concerned and not the agent of the city of New York," to which contract a profile was attached — the contractor is not entitled to recover for losses suffered in the grading of the avenue by reason of the mistakes of the city surveyor in grades given by him although the contractor did not request that the grades be furnished him, and upon discovering the mistakes notified the superintendent of street improvement of them and proceeded only after his positive direction to conform the avenue to the grades given, for the reason that the duty of the contractor was to follow no grade except such as was in accordance with the profile, and the direction of such officer was a material modification of this requirement which he had no power to make in the absence of an express authorization by the proper authorities; and, therefore, the contractor proceeded at his peril to obey such direction, and in not relying upon the profile alone.

Becker v. City of New York, 77 App. Div. 635, modified.

(Argued October 19, 1903; decided November 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Janu-

ary 10, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for appellant. The plaintiff is not entitled to recover for losses suffered on account of mistakes in grades furnished the contractor by the city surveyor. (*Cluff v. Day*, 141 N. Y. 580; *Roberts & Co. v. Buckley*, 145 N. Y. 215; *Matter of Landy*, 161 N. Y. 429; *Wickham v. L. V. R. R. Co.*, 85 App. Div. 182; *O'Brien v. Mayor, etc.*, 139 N. Y. 576.)

L. Laflin Kellogg and Alfred C. Petté for respondent. The plaintiff was entitled to recover the sum of \$9,724, the increased cost of the work occasioned by the errors and mistakes in the lines and grades given by the engineer in charge. (L. 1882, ch. 410; *Mulholland v. Mayor, etc.*, 113 N. Y. 631; *Horgan v. Mayor, etc.*, 160 N. Y. 516.)

HAIGHT, J. The plaintiff's testator was the assignee of the claim of one Benjamin J. Carr, Jr., and brings this action to recover the damages suffered by him arising out of his contract with the defendant for regulating and grading Claremont avenue from One Hundred and Twenty-second street to One Hundred and Twenty-seventh street in the city of New York. In our review of the case it becomes necessary to discuss but one of the various claims in controversy between the parties, and that arises out of the second count in the complaint, in which damages are asked for the errors of the city surveyor in giving an incorrect grade of the street, by which the contractor was misled and excavated a greater amount of rock than was required by the contract and was then compelled to fill in the excavation so as to conform the grade to the specifications.

This case has been once previously considered in this court (170 N. Y. 219). The judgment was then reversed, upon

grounds not material to be now considered, but in the opinion then written it was stated that there could be no recovery for damages claimed by reason of the errors in the grade given by the surveyor. It is now claimed that upon the retrial further evidence was presented as to this claim, upon which the trial court, under the objection and exception of the defendant, submitted the same to the jury and a verdict has been found thereon for the plaintiff amounting to the sum of \$8,520. The new evidence upon which the plaintiff relies for the purpose of establishing this claim is found in the testimony of the contractor, and is to the effect that he saw Mr. Dean, the superintendent of street improvements, after the work had been in progress from fifteen to seventeen months, in his carriage at One Hundred and Twenty-second street and Claremont avenue, and then requested him to go and look at the discrepancy in the grade lines; that Dean replied to the effect that he could do nothing in the matter; that his letter to him was specific, and that he would have to follow the grades and lines as given by Mr. Slator, the engineer in charge. The letter referred to had been written on the 18th of July, 1890, six or eight months before, and in that letter there appears a similar statement to the effect that he would have to follow the lines and grades given by the engineer in charge. This letter was written in answer to a letter by the contractor calling his attention to the error in the lines of the street as given by the surveyor before any error in the grade had been discovered. This letter was considered by the court on the former review, and we shall not discuss it further. We are thus brought to the consideration of the question as to whether the direction given by the superintendent of street improvements to follow the grade lines given by the engineer in charge justifies a recovery.

The contract, so far as material upon this branch of the case, provides that "a city surveyor will be employed by the parties of the first part to see that the work is completed in conformity to the profile, and to ascertain and certify the quantity of work done. Said surveyor, at the request of the

contractor, will be directed to designate and fix grades for his guidance during the progress of the work without charge, provided that the said parties of the first part shall not be liable for any delay or for any errors of said surveyor in giving such grades, and said surveyor shall be considered as the agent of the contractor so far as giving such grades is concerned and not the agent of the City of New York." A profile was attached to the contract, and the contract was executed by the commissioner of public works of the city and by the contractor, pursuant to an ordinance of the mayor, aldermen and commonalty of the city of New York, adopted on the 23d day of July, 1889, in which the regulating and grading of this avenue was directed and sealed estimates were invited from bidders according to the plans and specifications which were attached to and made a part of the contract. As we understand this provision of the contract it became the duty of the contractor to grade the street in accordance with the profile. He could employ his own surveyor, or if he asked the city surveyor would give him the grades, but upon the understanding that the city should not be liable for the errors of the surveyor, and that in giving such grades he should be considered to be the agent of the contractor. The evidence tends to show that the city surveyor did set stakes and mark the grades thereon and that the grades so marked were erroneous and that the contractor in excavating to the depth required by the marks upon the stakes excavated to a greater depth than required, which had to be refilled and that he suffered damages in consequence thereof.

The contractor now claims that he was compelled to perform the work in accordance with the grades given by the surveyor, by the superintendent of street improvements, who, after the contractor had called his attention to errors in the grade, directed him to follow the lines and grades as given by the surveyor. As we have seen from the contract, the contractor was required to conform the street to the profile. He was not obliged to conform the grade to that given by the city surveyor, but could have ascertained the same through

any other surveyor, and if he saw fit to request the city surveyor to give him the grades he made him his own agent and agreed that the city should not be liable for his errors. The direction of the superintendent of street improvements, to the contractor to proceed and conform the street to the grades given by the city surveyor, is inconsistent with these provisions of the contract and is a material variation of its terms. The question thus arises as to whether this officer had the power to modify or change the contract in this regard. He was a subordinate officer in the department of public works. His duties required him to watch the work of contractors and see that their work was done in accordance with the requirements of the contract and upon the completion of the work to give a certificate. We think he had no power to change or modify the contract, or to relieve the contractor from the provisions in question. This question was disposed of in this court, as early as the case of *Bonesteel v. Mayor, etc., of N. Y.* (22 N. Y. 162). In that case the common council of the city of New York had passed an ordinance directing the regulating and grading of Seventieth street from Tenth avenue to the Hudson river, the work to be performed under the directions of the street commissioner and the city surveyor. The contract provided that the rock was to be excavated two feet below the line of the curbstone grade. The contractor excavated the rock only one foot below such grade and claimed that this was done by the direction of the city surveyor. DAVIES, J., in delivering the opinion of the court, says with reference to this contention that "the ordinance under which the work was done provided that the street was to be regulated and graded under such directions as should be given by the street commissioner and one of the city surveyors. The first suggestion to be made in reference to this provision is, that the ordinance would seem to contemplate joint directions by the street commissioner and the city surveyor. The direction to excavate the rock only to the depth of one foot, would appear to have been given by the surveyor only, without the coöperation of the

street commissioner. But a conclusive answer to this view of the case is, that the provision of the ordinance that the work should be done under such directions as should be given by these officers, conferred no authority upon them, or either of them, to change or modify in any essential particular the provisions of the contract made and entered into for the performance of the work. The ordinance of the defendants contemplated that the work was to be done under a written contract. The basis of that contract was the proposal or specification issued by the proper head of department, inviting estimates. When they were received and the award made to the lowest bidder, and that award confirmed by the common council, all the materials for the written contract were provided. When the contract finally became perfected, signed and executed, no officer of the defendants had any authority to change its provisions unless expressly authorized by the common council. No such authority has been shown in this case, or any acquiescence by the defendants in the departure from the terms of the contract made by the plaintiff's assignor with the acquiescence and pursuant to the directions of the city surveyor. Such departure had, therefore, no legal justification, and the plaintiff has, therefore, himself shown a non-performance on his part of what he claims was his contract with the defendants." Dillon in his work upon Municipal Corporations, at section 451 (third edition), says with reference to the variance or modification of a contract, that "where the contract is made by ordinance in the statutory mode it can only be repealed or annulled in the same manner." In *City of Terre Haute v. Lake* (43 Ind. 480) it was held that the common council of a city can only contract by an order, resolution or ordinance passed in the manner required by statute, and when thus made it can be repealed or annulled only by the vote of the common council. (See, also, *Glacius v. Black*, 50 N. Y. 145; *Fitzgerald v. Moran*, 141 N. Y. 419; *Woodruff v. Roch. & Pittsburgh R. R. Co.*, 108 N. Y. 39; *Hague v. City of Philadelphia*, 48 Pa. St. 527, and *North. Pac. L. & M. Co. v. East Portland*, 14 Oregon, 3.)

The judgment should be reversed and a new trial ordered, with costs to abide the event, unless the plaintiff within twenty days stipulates that the judgment may be reduced in the sum of \$8,520, and if such stipulation is given, then the judgment be modified accordingly, and as so modified affirmed, without costs of this appeal to either party.

MARTIN, J. (dissenting). The plaintiff's testator was the assignee of a claim of one Benjamin J. Carr, Junior, arising under a contract made between him and the city of New York in 1889, for regulating and grading Claremont avenue from 122d street to 127th street. This action has been several times tried and was before this court on a former appeal. Although numerous questions were presented upon the argument and by the briefs of counsel, yet, in view of our previous decision in this case, but a single question is presented which we deem it necessary to consider at this time. The question we shall consider arises under the second cause of action stated in the complaint, by which the plaintiff seeks to recover the damages sustained by the original contractor by reason of his having been required by the defendant to perform a large amount of unnecessary work in the fulfillment of his contract.

The contention of the plaintiff is that this loss was occasioned by the action of the defendant's officers and employees in giving the contractor an incorrect grade of the street and then compelling him to conform the street to the grade as thus given, although he at the time insisted that it was wrong and objected to it as inaccurate. The provision of the contract relied upon by the defendant to exempt it from such liability in effect provides that a city surveyor, at the request of the contractor, will be directed to designate and fix grades for his guidance during the progress of the work without charge, provided that the city shall not be liable for any delay or any errors of such surveyor in giving such grades, and the surveyor shall be considered as the agent of the contractor so far as the giving of such grade is concerned, and not as the agent of the city.

It is quite evident under this provision of the contract that if the contractor requested the city surveyor to designate and fix the grades the latter would be regarded as his agent, and the city would not be liable for any delays or errors of such surveyor. So, also, if, without objection, the contractor used the grades thus given, thereby acquiescing in and ratifying the surveyor's action, and accepting him as his agent within the terms of the contract, the city would not be liable, and we so held in the former decision of this case (170 N. Y. 219). But we also held that the contractor was entitled to recover for losses suffered in grading this street caused by the errors of the city surveyor in fixing the center line, where it was done by the city without the request or acquiescence of the contractor, and the contractor, afterwards distrusting its accuracy, sought to have it properly corrected, but failed, and finally proceeded with the work on that line as he was directed to do by the superintendent of streets.

When our former decision was rendered there was evidence tending to show that that was the situation so far as the center line established by the city surveyor was concerned, and it was held that the loss sustained by the contractor, due to the inaccurate line, was a proper charge against the defendant and might be recovered. It was then said: "It cannot be reasonably said that under this state of facts the contractor had, by acquiescence, made the city surveyor his agent. On the contrary, the contractor was reasonably alert to discover the correct center line, and followed the one furnished him, which he had been advised by his own surveyor was inaccurate, only when the superintendent of street improvements, after being fully advised as to all the facts, ordered him to do so." As the evidence then stood, the loss sustained by the contractor on account of the mistakes as to the grades other than as to the center line, was not recoverable, as there was then no sufficient evidence to show that the contractor had, after objection by him, proceeded with the work in accordance with such grades under compulsion or the positive direction of the city authorities. Upon the last trial, however, the evidence in that

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respect was changed, as the contractor then not only testified that he did not request the city surveyor to give him either stakes, lines or grades, but also that after discovering the inaccuracy of the grade furnished by the city surveyor in other respects, as well as to the center line, he saw the superintendent of street improvements, called his attention to it and requested him to look at the discrepancies in those respects and to the defects in the lines and grade. To this request the superintendent replied that he could do nothing in the matter, but that the letter he wrote, in which he said, "you will proceed with your work * * * in accordance with the grade lines and stakes as given by Mr. Slator, surveyor in charge," was specific, and that the plaintiff would have to follow the grades and lines as given by the engineer in charge. This evidence was corroborated by the witness Burke, who testified that he was present upon the work when the defendant's contract with the original contractor was discussed; that the contractor told the superintendent that there had been a mistake made by Slator, and the superintendent replied that he would not get out of his wagon and examine those things, but that he should obey the orders of Mr. Slator, the engineer in charge of the work, and work by his stakes only. With this evidence in the case the jury was justified in finding that the contractor was reasonably alert to discover the correct grade, that he apprised the superintendent of the inaccuracy of that furnished by the surveyor, and that he performed the work in accordance with the lines and grades thus given only when the superintendent of street improvements, being advised of such inaccuracies, ordered him to do so. Under these circumstances it seems quite clear that upon the authority of our former decision in this case the recovery on the last trial must be sustained, or the principle of that decision overruled.

It is to be observed that the provision in the contract upon which the defendant relies relates to grades as a whole, and not to lines or grades separately. Hence, the term "designate and fix grades" is to be construed as involving all the essen-

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It is to be observed that the provision in the contract upon which the defendant relies relates to grades as a whole, and not to lines or grades separately. Hence, the term "designate and fix grades" is to be construed as involving all the essen-

It is quite evident under this provision of the contract that if the contractor requested the city surveyor to designate and fix the grades the latter would be regarded as his agent, and the city would not be liable for any delays or errors of such surveyor. So, also, if, without objection, the contractor used the grades thus given, thereby acquiescing in and ratifying the surveyor's action, and accepting him as his agent within the terms of the contract, the city would not be liable, and we so held in the former decision of this case (170 N. Y. 219). But we also held that the contractor was entitled to recover for losses suffered in grading this street caused by the errors of the city surveyor in fixing the center line, where it was done by the city without the request or acquiescence of the contractor, and the contractor, afterwards distrusting its accuracy, sought to have it properly corrected, but failed, and finally proceeded with the work on that line as he was directed to do by the superintendent of streets.

When our former decision was rendered there was evidence tending to show that that was the situation so far as the center line established by the city surveyor was concerned, and it was held that the loss sustained by the contractor, due to the inaccurate line, was a proper charge against the defendant and might be recovered. It was then said: "It cannot be reasonably said that under this state of facts the contractor had, by acquiescence, made the city surveyor his agent. On the contrary, the contractor was reasonably alert to discover the correct center line, and followed the one furnished him, which he had been advised by his own surveyor was inaccurate, only when the superintendent of street improvements, after being fully advised as to all the facts, ordered him to do so." As the evidence then stood, the loss sustained by the contractor on account of the mistakes as to the grades other than as to the center line, was not recoverable, as there was then no sufficient evidence to show that the contractor had, after objection by him, proceeded with the work in accordance with such grades under compulsion or the positive direction of the city authorities. Upon the last trial, however, the evidence in that

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respect was changed, as the contractor then not only testified that he did not request the city surveyor to give him either stakes, lines or grades, but also that after discovering the inaccuracy of the grade furnished by the city surveyor in other respects, as well as to the center line, he saw the superintendent of street improvements, called his attention to it and requested him to look at the discrepancies in those respects and to the defects in the lines and grade. To this request the superintendent replied that he could do nothing in the matter, but that the letter he wrote, in which he said, "you will proceed with your work * * * in accordance with the grade lines and stakes as given by Mr. Slator, surveyor in charge," was specific, and that the plaintiff would have to follow the grades and lines as given by the engineer in charge. This evidence was corroborated by the witness Burke, who testified that he was present upon the work when the defendant's contract with the original contractor was discussed; that the contractor told the superintendent that there had been a mistake made by Slator, and the superintendent replied that he would not get out of his wagon and examine those things, but that he should obey the orders of Mr. Slator, the engineer in charge of the work, and work by his stakes only. With this evidence in the case the jury was justified in finding that the contractor was reasonably alert to discover the correct grade, that he apprised the superintendent of the inaccuracy of that furnished by the surveyor, and that he performed the work in accordance with the lines and grades thus given only when the superintendent of street improvements, being advised of such inaccuracies, ordered him to do so. Under these circumstances it seems quite clear that upon the authority of our former decision in this case the recovery on the last trial must be sustained, or the principle of that decision overruled.

It is to be observed that the provision in the contract upon which the defendant relies relates to grades as a whole, and not to lines or grades separately. Hence, the term "designate and fix grades" is to be construed as involving all the essen-

tials necessary to the complete designation and establishment of the entire grade, including the necessary lines as well as the depth and height of the excavation or fill. Therefore, in considering the question of the defendant's liability for having furnished the contractor with an erroneous grade and having, with notice of its inaccuracy, insisted upon and required him to construct the street upon and in accordance with it, the same principle as to the defendant's liability should be applied to the error relating to the required excavation or fill, as was applied to the error as to the center line. While in our former decision we expressly declined to pass upon the construction of that term, it was, however, said: "It is to be observed that this clause of the contract does not in terms refer to lines, or center lines, but requires the surveyor to 'designate and fix grades.' It may be that the designation and fixing of grades includes the giving of lines and center lines." We now think that to hold that the term "designate and fix grades" does not include both lines and grades, and apply to, required excavation and filling as well as to the center line, would be too narrow and an incorrect construction of that term as used in and intended by this contract. Therefore, we are of the opinion that, in view of the change in the evidence, the same rule applies to the furnishing of the grades by the city surveyor and the requirement of the superintendent of street improvements that the work should be conformed thereto, as was applied in the former decision to the line so furnished, the facts as they now stand being essentially the same as to each. Obviously it was upon the basis of our former decision that the case was tried and determined by the courts below, as upon the last trial the learned trial court expressly charged the jury that before the plaintiff could recover she must prove to its satisfaction that the contractor was directed to follow the grades and lines given by the surveyor, after the defendant's attention was called to the fact that they were incorrect.

But it is sought to be maintained that the superintendent of street improvements, who was the chief officer under the com-

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missioner of public works having direct charge and control of the work upon contracts for the regulating and grading of streets, had no right to direct the contractor to follow any grade except such as was in accordance with the profile. It is also claimed that the grades as given were not according to the profile, and, consequently, although the contractor was required to perform the work under the direction of the bureau of which the superintendent was the head, yet that the contractor was bound at his peril to disregard any and all directions given him by such officer and rely upon the profile alone. It does not seem possible that a city could, by its officers in charge of the work, compel the contractor to do work in a specified way, and then require him to expend large additional sums in doing it otherwise, without liability upon the part of the city to respond in damages for the extra work occasioned by its wrongful direction, especially where, as in this case, the trial court was justified in finding not only that the action of the city surveyor in giving the final certificate was false and made in bad faith, but also that the contractor was required by the superintendent to perform the work in accordance with the grade furnished by the city surveyor, against the protest of the contractor, and after notice by him to the superintendent that the grades thus given were erroneous. As sustaining the doctrine contended for by the defendant, it relies upon the cases of *Bonesteel v. Mayor, etc., of N. Y.* (22 N. Y. 162); *Glacius v. Black* (50 N. Y. 145); *Woodruff v. Roch. & Pittsburgh R. R. Co.* (108 N. Y. 39), and *Fitzgerald v. Moran* (141 N. Y. 419).

An examination of those cases discloses that they are clearly distinguishable from the case at bar, and were decided upon principles which have no application here. In the *Bonesteel* case it was held that where work was done under an ordinance for the grading of the street, and the contract under it provided in express terms the depth of the excavation and all the particulars of the work, to be done under the direction of the street commissioner, a change of depth from two feet to one could not be made by the officer having superintendence of

the work; that as the common council authorized the street commissioner to contract only for the excavation of rock one foot below the grade, he had no right to enter into a contract for its excavation two feet below the line of the curbstone grade; and that by assuming to make a contract different from that authorized by the common council, he acted without authority, and, hence, there could be no recovery. The *Glacius* case merely holds that where one enters into a contract to furnish materials and perform work, and materials are furnished and work performed, but not done in the manner stipulated, no action will lie for the compensation, and that, at least, a substantial performance must be shown before a recovery can be had. In *Woodruff v. Roch. & P. R. R. Co.* the plaintiff as sub-contractor made a cut through an elevation, and after it was substantially completed the sides caved in and the plaintiff removed the earth upon the request of the engineers in charge under an agreement that it should be taken out for a price specified, it, however, appearing that the work was under the supervision of the original contractors, and that they paid all the engineers and entered into sub-contracts for the performance of the work. In an action against the railroad company it was held that the evidence failed to show any liability upon its part, as it did not disclose that the work was done under any express or implied agreement with it. The *Fitzgerald* case was an action upon a contract for plastering, which provided that certain designated cement should be mixed with equal parts of good, sharp and dry sand, while the mixture used was made of two parts of sand to one of cement, and it was held that neither the superintendent nor the architect had any right to thus change the contract. Clearly the principle of those cases has no application to the question under consideration.

When, however, we examine the cases of *Messenger v. City of Buffalo* (21 N. Y. 196, 199); *Mulholland v. Mayor, etc., of N. Y.* (113 N. Y. 631, 632); *Brady v. Mayor, etc., of N. Y.* (132 N. Y. 415, 427), and *Horgan v. Mayor, etc., of N. Y.* (160 N. Y. 516, 523), we there find the prin-

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ciple applicable to the case at bar, and abundant authority to sustain the recovery in this action. In the *Messenger* case the city of Buffalo employed the plaintiff to pave a street and to furnish the sand for that purpose under a contract by which it was to grade the street, and the work of paving was to be performed under the direction of the street commissioner. The street was so excavated that a quantity of sand beyond that specified in the contract was necessary. The plaintiff, by the direction of the street commissioner, furnished the excess required, and this court held that he was entitled to compensation therefor. In that case it was claimed that when the plaintiff found he could not fulfill his contract in all particulars he should have obtained the action of the common council before commencing or continuing the work, but this court said: "This could not have been absolutely required to enable him to recover. The corporation had authorized the street commissioner to make the contract, and the contract made provided that the work should be done under the direction of such commissioner. This plainly intended that the street commissioner might direct in regard to variations rendered necessary by the action of the city authorities." In the *Mulholland* case there was a contract between the plaintiff's assignor and the defendant for grading and flagging one of its streets. Through the erroneous action of the defendant's engineer, more work was required of the contractor than would have been necessary under the contract, and it was held that the plaintiff was entitled to recover. The court said: "The change was erroneous, and if the correction of the error, or by reason of it, the plaintiff performed extra labor and incurred increased expense, he is entitled to recover according to its value and amount." In *Brady v. Mayor, etc., of N. Y.*, PARKER, J., said: "It is quite clear that it was the intention of the parties under this contract that the contractor should in its execution be governed by the direction of such of defendant's officers as it declared in the contract should represent it. So if the grade should be mistakenly given to the contractor by the surveyor and the work should be done in conformity therewith, and

certificates of completion afterwards given, the defendant could not thereafter object that the plaintiff should not be compensated because, as the result of a misdirection by its officers, the specifications had not been literally complied with." The *Mulholland* case was there considered and the principle established by it reaffirmed. These cases were again examined by this court in *Horgan v. Mayor, etc., of N. Y.*, where Judge BARTLETT said: "It has been frequently held that if a municipal corporation, by its own act, causes the work to be done by a contractor to be more expensive than it otherwise would have been according to the terms of the original contract, it is liable to him for the increased cost or extra expense." (See, also, *Moore v. Mayor, etc., of N. Y.*, 73 N. Y. 238; *Reilly v. City of Albany*, 112 N. Y. 30, and *Van Dolsen v. Bd. of Education*, 162 N. Y. 446, 452.)

An examination of the foregoing authorities and the consideration of the decision in this case upon a former appeal render it quite obvious that under the evidence as it appears in the record of the trial under review, the plaintiff was entitled to recover for the additional work he was compelled to perform by reason of the erroneous grade given him by the surveyor in charge and according to which he was required by the superintendent of street improvements, with a full knowledge of the facts, to grade the street and by whom he was subsequently required to change such grade at a large additional outlay.

These considerations lead to the conclusion that the judgment appealed from should be affirmed.

GRAY, CULLEN and WERNER, JJ., concur with HAIGHT, J.; PARKER, Ch. J., and VANN, J., concur with MARTIN, J.

Judgment accordingly.

E. MAY DE GARMO, Appellant, v. GEORGE W. PHELPS et al.,
Respondents.

CHAMPERTY—WHEN PURCHASE-MONEY MORTGAGE NOT CHAMPERTOUS. Judicial sales are not within the condemnation of the Statute of Champerty (1 R. S. 739, §§ 147, 148; Real Property Law, 1895, ch. 547, § 225); a purchaser of land sold under a decree in a foreclosure action acquires a perfect title, although at the time the premises are in the actual possession of one claiming title thereto under a tax deed; a mortgage executed by him on the same day to the plaintiff to secure a part of the purchase price is not void under the statute since the deed and the mortgage take effect at the same instant, constituting but one act, and the mortgagee, to the extent of his mortgaged interest, whether it be considered a lien or a conditional estate, must be regarded as much a purchaser at the judicial sale as the mortgagor, and acquires the title not from him but through him as a mere conduit; the assignee of such purchase-money mortgage who forecloses it and bids in the premises acquires the title thereto and may maintain an action of ejectment for their recovery.

De Garmo v. Phelps, 64 App. Div. 591, reversed.

(Argued October 26, 1903; decided November 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 28, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles F. Tabor for appellant. The conveyance to Inglehart and eventually to this plaintiff was not within the inhibition of the statute which provides that "every grant of land shall be absolutely void if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." (1 R. S. 739, § 147; *Hendricks v. Andrews*, 7 Wend. 152; *Livingston v. P. I. Co.*, 9 Wend. 512; *Moody v. Moody*, 16 Hun, 191; *Cary v. Goodman*, 22 N. Y. 170; *Fish v. Fish*, 39 Barb. 512; *Tyler v. Heldon*, 46 Barb. 439; *Webb v. Bindon*, 21

Wend. 99; *Preston v. Hunt*, 7 Wend. 53; *Zink v. McManus*, 121 N. Y. 265.) The plaintiff obtained her title by the decree and judgment of the Supreme Court, and the Champerty Act does not prohibit the sale by judicial decree. (*Hoyt v. Thompson*, 5 N. Y. 320; *Truax v. Thorn*, 2 Barb. 156; *Tuttle v. Jackson*, 6 Wend. 224; *Stevens v. Hauser*, 39 N. Y. 306; *Smith v. Scholtz*, 68 N. Y. 53; *Coleman v. M. B. I. Co.*, 94 N. Y. 234; *Sandiford v. Frost*, 9 App. Div. 57; *O'Toole v. Garvin*, 1 Hun, 95; *Ten Eyck v. Witbeck*, 55 App. Div. 165; 170 N. Y. 564.)

John F. Connor for respondents. The deed to Inglehart, dated May 22, 1893, was void as against the defendant George W. Phelps, as he was in actual possession of the premises, claiming the same under title adverse to Inglehart and his grantors. (L. 1896, ch. 547, § 225; *Becker v. Howard*, 66 N. Y. 5; *Chard v. Holt*, 136 N. Y. 30.) Assuming that the deed given to Inglehart was valid because it was given in a judicial proceeding, there can be no question but that the mortgage given by him May 22, 1893, and through which the plaintiff claims title, was void. (L. 1896, ch. 547, § 225; *Louber v. Kelley*, 17 Abb. Pr. 452; 6 Bosw. 492; *Becker v. Howard*, 66 N. Y. 5; *Chard v. Holt*, 136 N. Y. 30.)

CULLEN, J. The action is in ejectment for the recovery of a piece of land in the village of Nunda, county of Livingston. Under the findings of the trial court there is but a single question presented to us on this appeal. The plaintiff traced her title from one Robert Girven, concededly the owner and in possession of the premises, who, on April 25th, 1889, mortgaged the property to one James H. Carmichael. The mortgage was subsequently assigned to Annie E. Volger, and default having been made in its payment it was foreclosed by action. At the sale made under the judgment in said action the lands were sold and conveyed to Fred. M. Inglehart, who on the same day executed to said Volger a mortgage to secure \$1,000 of the purchase money. Mrs. Volger subsequently

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assigned her mortgage to the plaintiff, who, default having been made in its payment, brought an action to foreclose the same. Under the judgment in that action Mrs. De Garmo, the plaintiff therein, purchased the mortgaged lands. In October, 1892, intermediate the execution of the mortgage from Girven to Carmichael and the sale under the judgment for the foreclosure of said mortgage, the defendant entered into possession of the premises, claiming title under deed executed by the county treasurer of Livingston county for non-payment of taxes, and has remained ever since in possession, claiming in hostility to the plaintiff and her predecessors in title. The trial court held that such adverse possession defeated the plaintiff's title under the provisions of the statute (1 R. S. p. 739, secs. 147, 148; Real Property Law, chap. 547, Laws of 1896, § 225), which provide that "every grant of lands shall be absolutely void, if at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. But every person having a just title to lands, of which there shall be an adverse possession, may execute a mortgage on such lands; and such mortgage, if duly recorded, shall bind the lands from the time the possession thereof shall be recovered by the mortgagor or his representatives."

That judicial sales do not fall within the condemnation of these statutory provisions has been settled law from a very early time in the history of this state. (*Tuttle v. Jackson*, 6 Wend. 213; *Hoyt v. Thompson*, 5 N. Y. 320; *Stevens v. Hauser*, 39 N. Y. 302; *Coleman v. Manhattan Beach Impr. Co.*, 94 N. Y. 229.) Therefore, neither of the deeds made in pursuance of the judgments of foreclosure and sale was void. The statute does not assume to deal with assignments of mortgages, and in the only case that I can find in which the question was presented a similar statute was held inapplicable to such transfers. (*Converse v. Searls*, 10 Vt. 578.) Inglehart, therefore, by his purchase at the sale in the first foreclosure suit, acquired a perfect title, and the only doubtful link in the plaintiff's chain of title is the mortgage which Inglehart gave back to the

plaintiff in the foreclosure suit to secure part of the purchase money. I concede that, though Inglehart's title was perfect, the statute rendered any voluntary conveyance by him, while the lands were in adverse possession by another party, void; and while the statute authorized him to mortgage his lands, I assume that the effect of the provision that the mortgage shall bind the lands from the time the possession thereof is recovered by the mortgagor is to exclude such operation until possession is so recovered, which in this case never occurred. Hence, if the mortgage from Inglehart to Mrs. Volger, under the foreclosure of which the present plaintiff claims, had been given for any other purpose than to secure the purchase money, I am inclined to the view that the plaintiff's title would fail. But there is a marked distinction between a purchase-money mortgage and any other. In the case of such a mortgage dower does not attach as against the mortgage, nor do existing judgments or claims against the mortgagor obtain priority over it. This is the rule in this state by statute; but the statute is only declaratory of the rule of law existing before it was enacted (*Mills v. Van Voorhies*, 20 N. Y. 412), and the same rule obtains in states where there are no statutes on the subject. (1 Jones on Mortgages, § 468.) Now, the ground on which this rule rests is not the superior equity of the holder of a lien for the purchase money, but the theory that the conveyance and mortgage, whether the latter be to the grantor or to a third party, are but separate parts of a single entire contract. In *Holbrook v. Finney* (4 Mass. 566) a wife was held not entitled to dower in lands conveyed to her husband by his father and simultaneously mortgaged by the son to the father. It was there said: "In the case at bar the execution of the two deeds, they being of even date, was done at the same instant and constitutes but one act." This dictum was quoted with approval by Chief Justice SPENCER in *Stow v. Tift* (15 Johns. 458), saying: "Where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money, at the same time that he executes the deed, the

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deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act." In *Clark v. Munroe* (14 Mass. 351) the doctrine of *Holbrook v. Finney* was applied in favor of a third party who advanced a portion of the purchase money, to secure which he received a mortgage. "A deed and purchase-money mortgage, given at the same time, are to be construed together as forming one instrument or contract." (*Rawson v. Lampman*, 5 N. Y. 456.) In *Curtis v. Root* (20 Ill. 53) Chief Judge CATON said: "The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping at all in the purchaser, and during such instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books, why the mortgage takes precedence of the judgment rather than any supposed equity which the vendor might be supposed to have for the purchase money." In that case the mortgagee was not the grantor, but a third party. If the doctrine of these cases be sound, it seems to me that Mrs. Volger, to the extent of her mortgage interest, whether it be considered a lien or a conditional estate, was just as much a purchaser at the judicial sale had under the decree as was Inglehart, the mortgagor, and that she acquired her title from the court, not from Inglehart, but merely through Inglehart as a conduit. It was her money that went to satisfy the decree and she was the plaintiff in the foreclosure suit, and, if necessary, it might be well held that the new mortgage was a mere extension *pro tanto* of the old mortgage under foreclosure. The mortgage to her, therefore, did not fall within the statute.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

GRAY, J. (dissenting). I think that the judgment below is right and that it should be affirmed by us. The effect of the unanimous affirmance is to establish conclusively, upon this

review, the fact that, prior to and at the time of Inglehart's purchase at the judicial sale, the defendant Phelps was in actual possession of the land and that he was claiming it under a title adverse to that of Inglehart, or of his predecessor in title. The validity of the county treasurer's deed, through which he claims, is not an issue to be tried. Whether a party, who claims by right of adverse possession, has a rightful title is not an essential fact. That fact is not the issue in such an action, where the defense is that the plaintiff's title rests upon a champertous conveyance. The very object of the statute, which was founded on a common-law principle, was to prevent a party out of possession from transferring his right to litigate for the recovery of possession. (*Sands v. Hughes*, 53 N. Y. 295, 297.) Under the statute, an adverse possession of a single day, whether known, or unknown, to the grantor, had been held to avoid the conveyance. (*Crary v. Goodman*, 22 N. Y. 170.) Indeed, so strict was the application of the law, that the purchaser of land in the possession of a third party, only, escaped a penalty, imposed in the early legislation of this state, upon establishing that he had no knowledge of the fact. (*Teele v. Fonda*, 7 John. 251; *Preston v. Hunt*, 7 Wend. 53.)

If the inhibition of the statute applies to plaintiff's case, then it is only necessary that the defendant should have had color of title, with an actual possession. The Revised Statutes, in force at the time of Inglehart's transaction, provided that "Every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor" and that "every person having a just title to lands, of which there shall be an adverse possession, may execute a mortgage on such lands; and such mortgage, if duly recorded, shall bind the lands from the time the possession thereof shall be recovered, by the mortgagor or his representatives." (1 R. S. 739, §§ 147, 148.) The present Real Property Law preserves a similar provision. (Laws of 1896, ch. 547, § 225.) The conveyance to Inglehart by the judicial

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officer, upon his purchase at the judicial sale, was not within the inhibition of the statute; because, being a judicial sale, the statute could have no application and this was always so held. (See 4 Kent's Com. 447; Coke's Litt. 214a; *Tuttle v. Jackson*, 6 Wend. 224; *Truax v. Thorn*, 2 Barb, 156; *Stevens v. Hauser*, 39 N. Y. 302; *Coleman v. Manhattan Beach Impr. Co.*, 94 ib. 229.)

While, therefore, the deed to Inglehart was not within the purview of the statute, the mortgage, which he executed to a third person, in order to procure a portion of the purchase money which he was to pay, came, clearly, within the statutory inhibition, and that was the position taken by the respondent, Phelps, upon his motion to dismiss the complaint at the close of plaintiff's case. The mortgage by Inglehart was a grant of land, then in Phelps' actual possession, to secure the performance of the promise to pay a sum of money. A mortgage is a deed with a condition, (90 N. Y. 618), and it is evident that the legislature thus regarded a mortgage; for, in the statute, it was made the subject of an exception and allowed effect, but only upon the mortgagor's recovering the possession of the land. It makes no difference that this mortgage is regarded as a purchase-money mortgage; which, upon an equitable doctrine, is given a certain priority of lien. It was, nevertheless, a grant of land with a defeasance clause, made at a time when the land affected was in the actual possession of one, who held adversely under color of title. The statute is imperative in its declaration as to the invalidity of such grants and the exception in favor of mortgages, only, makes them binding upon the land, when its possession is recovered by the mortgagor, or his representatives. That was Inglehart's position; such was that of his mortgagee and, of course, such is that of the plaintiff; who foreclosed the mortgage and purchased at the sale. If Inglehart had simply deeded the land purchased, no doubt could arise as to its being void and may we hold that a mortgage, given to a third person to procure a portion of the money payable upon the mortgagor's purchase of the premises, is excepted? That the statute was

not aimed at judicial sales is evident enough; for it would only be a transaction between private persons that could involve the sale and purchase of a pretended title and a transfer of a right to sue for the recovery of land. It was not any judicial legislation, by which purchasers at judicial sales were excepted from the operation of the statute; it was because the facts would not permit of it. But it is judicial legislation for the court to hold, in the face of the statutory provisions, that a purchase-money mortgage, made to a third person, was excepted.

In my opinion, Inglehart's mortgagee obtained no title, nor interest, in or to, nor lien upon, the land then held by Phelps in actual adverse possession and, consequently, the foreclosure proceedings, through which this plaintiff became a purchaser thereof and to which Phelps was a stranger, were without effect upon his interests.

PARKER, Ch. J., O'BRIEN and MARTIN, JJ., concur with CULLEN, J.; WERNER, J., concurs with GRAY, J.; HAIGHT, J., not voting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* MICHAEL RYAN, Respondent, *v.* JAMES L. WELLS *et al.*, Composing the Board of Taxes and Assessments of the City of New York, Appellants.

NEW YORK (CITY OF)—DEPUTY TAX COMMISSIONER—OFFICE OF, EXCEPTED FROM PROVISIONS OF SECTION 21 OF CIVIL SERVICE LAW PROHIBITING REMOVAL OF HONORABLY DISCHARGED VOLUNTEER FIREMEN THEREFROM, EXCEPT AFTER HEARING ON STATED CHARGES. The office of deputy tax commissioner of the city of New York is an office excepted, by the language thereof, from the provisions of the Civil Service Law (L. 1899, ch. 870, § 21, as amd. by L. 1902, ch. 270) prohibiting the removal of an honorably discharged soldier or volunteer fireman from any position, by appointment or employment, in the state or any of the cities thereof, except for incompetency or misconduct after a hearing upon stated charges, and, therefore, an honorably discharged volunteer fireman who has been removed by the board of tax commissioners without a trial, having been first given an opportunity of making an explanation,

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under the provisions of section 1543 of the charter, is not entitled to a hearing upon stated charges, and a writ of certiorari to review his removal will not lie.

People ex rel. Ryan v. Wells, 86 App. Div. 270, reversed.

(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered September 18, 1903, which annulled, on certiorari, a determination of the defendants removing the relator from the position of deputy tax commissioner of the city of New York.

The facts, so far as material, are stated in the opinion.

George L. Rives, Corporation Counsel (*James McKeen* and *Walter S. Brewster* of counsel), for appellants. The provisions of the statute under which the position of a deputy tax commissioner is created show that these deputies are within the exception in the Civil Service Law. (L. 1901, ch. 466, § 387; *Blust v. Collier*, 62 App. Div. 478; *People ex rel. v. Van Wyck*, 157 N. Y. 495.) Unless the relator was entitled to the special privileges given by section 21 of the Civil Service Law it cannot be questioned that the removal was made in accordance with the provisions of section 1543 of the charter. (*People ex rel. v. Brady*, 166 N. Y. 44.)

Robert H. Elder for respondent. The proceedings of removal are reviewable by certiorari because the statute expressly allows this remedy in cases of veterans and because they were judicial in their nature. (*People v. Brady*, 166 N. Y. 44; *People v. Scannell*, 62 App. Div. 253; *People v. Gleason*, 63 App. Div. 436; *People v. Flood*, 64 App. Div. 211.)

Per Curiam. The relator was a deputy tax commissioner of the city of New York and a veteran volunteer fireman. It cannot be doubted that under the provisions of section 1543 of the Greater New York charter he might have been

removed by the board of tax commissioners without a trial, having been first given an opportunity of making an explanation, unless his case is taken without that section by section 21 of the Civil Service Law (Chap. 370, Laws 1899, as amended by Chap. 270, Laws of 1902). The last statute provides that an honorably discharged soldier or volunteer fireman holding any position by appointment or employment in the state or any of the cities thereof shall not be removed from such position or employment except for incompetency or misconduct after a hearing upon stated charges. As originally enacted it, however, contained this qualification: "Nothing in this section shall be construed to apply to the positions of private secretary or deputy of any official or department, or to any other person holding a strictly confidential relation to the appointing officer." As amended in 1902 the qualification reads: "Nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department." The office of the relator is declared by the charter to be that of deputy tax commissioner which would bring him within the language of the exception or qualification in the civil service statute. The learned court below, however, was of opinion that because the statute as originally enacted contained the language "or to any other person holding a strictly confidential relation to the appointing officer," only such deputies were to be excepted from the provisions of the section as bore confidential relations to the appointing officers. It was further of opinion that the relation of deputy tax commissioner to the board of commissioners was not confidential and that, therefore, the relator could be removed only upon charges. We are by no means clear that the language of the civil service statute in its original form justified such a qualification or limitation of the term "deputy." However that may be, since the amendment of 1902, by which the provision as to "any other person holding a strictly confidential relation to the appointing officer" has been stricken out and the position of cashier, which is not necessarily confidential (*People ex rel. Tate v.*

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Dalton, 41 App. Div. 458; affirmed on opinion below, 160 N. Y. 686), added to the exceptions, such an interpretation we think no longer admissible and that the statute excepts all deputies in the various city departments. As the relator was not entitled to a hearing on charges, certiorari to review his removal would not lie. (*People ex rel. Kennedy v. Brady*, 166 N. Y. 44.) It follows that the order of the Appellate Division should be reversed and the proceeding dismissed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MAY CLARK,
Respondent, v. THE KEEPER OF THE NEW YORK STATE
REFORMATORY FOR WOMEN AT BEDFORD et al., Appellants.

THE STATE CHARITIES LAW—JURISDICTION OF NEW YORK CITY MAGISTRATE TO SENTENCE WOMEN TO STATE REFORMATORY AT BEDFORD UNDER SECTION 146 THEREOF—CONVICTION MUST BE FOR OFFENSES ENUMERATED THEREIN. Under section 146 of the State Charities Law (L. 1896, ch. 546, as amd. by L. 1899, ch. 632), providing that "A female, between the ages of fifteen and thirty years, convicted by any magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane, nor mentally or physically incapable of being substantially benefited by the discipline of either of such institutions, may be sentenced and committed to * * * the New York State Reformatory for Women at Bedford," a magistrate of the city of New York has no jurisdiction to sentence a woman to such reformatory unless she is convicted of one or more of the offenses enumerated therein; and a conviction thereunder is improper where it is impossible to determine, from the records and papers relating to the conviction and sentence returned upon writs of habeas corpus and certiorari allowed in her behalf, whether she was convicted of being a prostitute, either "public" or "common," assuming these terms to be practically synonymous, or on the charge of "disorderly conduct;" but, assuming that it is reasonably certain that the magistrate intended to convict the relator of "disorderly conduct," then the conviction is not a valid conviction for a mis-

demeanor, and, therefore, within the purview of the State Charities Law, unless the offense complained of constitutes a misdemeanor as defined by law; and where the record fails to show that the disorderly conduct complained of comes within the meaning of section 1458 of the Consolidation Act, which seems to have been incorporated into the Greater New York charter, or that of section 675 of the Penal Code, relating to the offense of disorderly conduct, so that it constitutes the offense of "disorderly conduct," as therein defined, and, therefore, is a misdemeanor, the relator is properly discharged from custody.

People ex rel. Clark v. Keeper, etc., 80 App. Div. 448, affirmed.

(Argued June 19, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 6, 1903, which affirmed an order of Special Term sustaining writs of habeas corpus and certiorari and discharging the relator from custody.

The facts, so far as material, are stated in the opinion.

William Travers Jerome, District Attorney (*Robert C. Taylor* and *Henry G. Gray* of counsel), and *John Cunneen*, Attorney-General, for appellants. The commitment was authorized by section 146 of the State Charities Law. (L. 1896, ch. 546; L. 1899, ch. 632; *People ex rel. v. Coon*, 67 Hun, 523; 51 N. Y. S. R. 339; *People v. Cowie*, 88 Hun, 498; *People ex rel. v. Superintendent, etc.*, 33 Misc. Rep. 245.) The city magistrate had jurisdiction in this proceeding. (*People ex rel. v. Coon*, 67 Hun, 523; *People v. Cowie*, 88 Hun, 498; *Matter of Hellman*, 174 N. Y. 254; *People v. Adelpi Club*, 149 N. Y. 5; *U. S. v. Graham*, 110 U. S. 219; *U. S. v. Finnell*, 185 U. S. 236; *People ex rel. v. N. Y. Cath. Protectory*, 101 N. Y. 195; *People ex rel. v. P. E. House of Mercy*, 128 N. Y. 180; *People ex rel. v. P. E. House of Mercy*, 133 N. Y. 207; *Matter of Knowack*, 158 N. Y. 487.)

Amos H. Evans for respondent. If the relator was convicted of disorderly conduct the judgment of conviction was

N. Y. Rep.] Opinion of the Court, per WERNER, J.

void, because of the magistrate being without jurisdiction, there being no such offense known to the law of the state of New York. (L. 1882, ch. 410, § 1458; Penal Code, § 675; *People ex rel. v. Reformatory*, 38 Misc. Rep. 233; L. 1895, ch. 601, § 14; L. 1901, ch. 466, § 1409.) The committing magistrate had no power to commit the relator to the state reformatory for the period of three years. (*People ex rel. v. Reformatory*, 38 Misc. Rep. 233; L. 1896, ch. 546, § 146; L. 1899, ch. 632.)

WERNER, J. On the 31st day of May, 1902, the relator was sentenced by a New York city magistrate to the State Reformatory at Bedford, N. Y., under the authority of section 146 of the State Charities Law (Chap. 26, Gen. Laws), which provides, in substance, that a female between the ages of fifteen and thirty years, who has been convicted by a magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane nor mentally or physically incapable of being benefited by disciplinary treatment, may be sentenced to the several reformatory institutions for women therein mentioned.

The learned district attorney has favored us with a most elaborate and instructive brief on the constitutionality of the section of the State Charities Law above referred to, but as that question is not distinctly raised by the respondent's counsel, and as there are other obvious infirmities in the record which require the affirmance of the order discharging the relator, we shall not now discuss or decide the constitutional question, for that may be of sufficient gravity and importance to merit the most serious consideration when presented by a record that is not so fatally defective as the one before us.

The complaint made by the officer who arrested the relator charges her with importuning and soliciting men for the purpose of prostitution, and with having been repeatedly arrested and convicted of the charge of disorderly conduct, in that she was in the habit of soliciting and importuning men for the

purpose of prostitution upon the street at all hours of the night, and with being "a public prostitute."

The record of conviction recites that the relator was brought before the magistrate and charged with "disorderly conduct" in importuning and soliciting men upon the street for the purpose of prostitution.

The warrant of commitment states that the relator was charged with "being a public prostitute," and that she was convicted upon that charge.

The magistrate's return to the writs of habeas corpus and certiorari issued herein sets forth that the relator was convicted "of such disorderly conduct charged in said complaint, and as in my opinion tended to and might provoke a breach of the public peace."

The relator demurred to this return, and, upon the issue thus joined, the Supreme Court at Special Term sustained the demurrer and the writs and discharged the relator from custody. At the Appellate Division this order was affirmed. There are several reasons why this decision should be sustained.

To begin with, the magistrate had no jurisdiction to sentence the relator to the reformatory at Bedford, because she was not convicted of any of the offenses enumerated in the statute which confers upon magistrates the power to sentence convicted women to that institution. The relator was not convicted of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, and those are the only offenses specified by name in section 146 of the State Charities Law. It is urged that the terms "public prostitute" and "common prostitute" are practically synonymous, so that a conviction under either designation amounts to one and the same thing, but even if that be conceded for the purposes of the argument, there still remains the practical difficulty of determining whether the relator was convicted of being a prostitute or for disorderly conduct. In the complaint the substance of the charge is that the relator was a "public prostitute," and her previous

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arrests and convictions for disorderly conduct are recited apparently as matter aggravating the charge. In the record of conviction the offense named is "disorderly conduct," and the reference to the soliciting of men for immoral purposes seems to be purely explanatory and incidental. The only offense referred to in the warrant of commitment is that of being a "public prostitute," but the magistrate's return to the writs ignores that charge and asseverates that the relator's conviction was had on the charge of "disorderly conduct." So palpable and confusing are these contradictions of the magistrate's record that it is impossible to say that any offense has been charged and set forth with the convenient certainty which the law requires. While it is not necessary that the offense should be charged with the precision required in an indictment, the record should show that the relator is charged with some offense known to the law by some statutory or legal definition (*People ex rel. Allen v. Hagan*, 170 N. Y. 52), and this is particularly true in cases where an alleged offender may, by a single act, lay himself liable to either one of several charges.

We have referred to the offenses mentioned by name in section 146 of the State Charities Law, upon conviction of either of which a woman of the prescribed age and condition may be sentenced to a state reformatory. To this category should be added the general designation of "misdemeanor" which appears at the end of the enumeration. We mention this because it is argued for the appellant that if there is no such offense as that of being "a public prostitute" the conviction herein should be upheld on the ground that "disorderly conduct" is a misdemeanor which brings the relator within the class of women who may be committed to state reformatories. Upon this point it is enough to say that, even if it were reasonably certain that the magistrate intended to convict the relator of "disorderly conduct," it would not necessarily follow that the conviction would be valid, for the case would then turn upon the question whether the charge of "disorderly conduct," as recited in the complaint, record of conviction and

warrant of commitment, is one which, under other statutes, is defined as an offense or a misdemeanor. In the abstract there is no such offense as "disorderly conduct," but by section 1458 of the Consolidation Act, which seems to have been incorporated into the charter of the Greater New York city, "every person in said city and county shall be deemed guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place in said city and county commit any of the following offenses, that is to say: (2) Every common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passers by," and by section 675 of the Penal Code "any person who shall, by any offensive or disorderly act or language, annoy or interfere with any person or persons in any place * * * shall be deemed guilty of a misdemeanor."

The most cursory comparison of the language of these statutes, with the verbiage of the magistrate's record herein, will disclose the essential insufficiency of the latter in the very particulars which go to make up the statutory offense of disorderly conduct. Taken as a whole, this record gave the magistrate no jurisdiction to render the judgment which is here the subject of inquiry. The writs of habeas corpus and certiorari were, therefore, the proper remedy (*People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *People ex rel. Van Riper v. N. Y. C. Protectory*, 106 N. Y. 605), and we think the case has been correctly disposed of by the courts below. We quite agree with the learned district attorney that there is no more important branch of our criminal jurisprudence than that which relates to the reformatory treatment of offenders who are not to be classed as criminals; but since the jurisdiction to administer such treatment is purely statutory, it is equally clear that in its exercise the forms of law should be observed, at least with reasonable approximation, for otherwise the rights of such offenders would be subject to invasions that will not be tolerated even in dealing with hardened criminals.

N. Y. Rep.] Dissenting opinion, per GRAY, J.

The errors of record in this case are not mere matters of form but go to the very substance of right and, therefore, the order herein must be affirmed.

GRAY, J. (dissenting). Upon the appeal to this court, the relator, as respondent, in the first place, insists that the returns to the writs show upon their face that "the proceedings before the committing magistrate were conducted in such a loose, careless and indefinite manner that it is impossible to determine the nature of the charge against her," or the basis of the magistrate's decision. In the second place, she says there is "no offense known to the law of the state as that of public prostitute." And, further, she insists that the magistrate was without jurisdiction; that he had no power to commit her for the period of three years and that the proceedings before him were void, because of the failure to keep a written record of the evidence upon which the judgment was based. Such was, also, her demurrer to the returns to the writs, in substance.

The return of the magistrate is open to the charge that he was slovenly in his records and careless in his proceedings; but, in my opinion, the proceedings exhibited in the return to the writs were not fatally affected thereby and they disclose a case of the valid exercise of jurisdiction over the person of the relator. If it was made to appear to the Supreme Court, upon the return to the writ, that the relator was held under a valid commitment, it had the force of a final judgment of a competent tribunal and it was the duty of the court to remand her. (Code of Civil Procedure, sec. 2032; *People ex rel. Kuhn v. P. E. House of Mercy*, 133 N. Y. 207.) The proceeding, upon the return to a writ of habeas corpus, is instituted to determine whether a person, detained in custody, was so detained under legal authority, and is not for the purpose of reviewing the determination of the subordinate tribunal. (*People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180.) Section 146 of the State Charities Law, (Laws of 1896, chap. 546, as amended by chap. 632, Laws of 1899), provides that "A female, between the ages of fifteen and thirty years,

convicted by any magistrate of petit larceny, habitual drunkenness, *of being a common prostitute*, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane, nor mentally or physically incapable of being substantially benefited by the discipline of either of such institutions, may be sentenced and committed to * * * the New York State Reformatory for Women, at Bedford ;” the term of the commitment being for a period of three years, or until discharged by the board of managers. The complaint, upon which the relator was arrested and brought before the magistrate, charged her with being “a public prostitute,” who was soliciting men for the purposes of prostitution, at a certain time and place, and who had been repeatedly arrested and convicted of the charge of disorderly conduct in committing such acts upon the streets. The complaint charged the offense defined by the statute and gave jurisdiction, if it existed. The examination of the relator exhibits her confession of being guilty of the charge which had been made against her. The warrant of commitment of the magistrate recited the charge made; the proceedings had before him upon her arrest and trial; the conviction upon the charge; that she was “not insane, nor mentally or physically incapable of being substantially benefited by the discipline” of the New York State Reformatory for Women at Bedford, and that she was committed to that institution “for the term of three years, unless sooner discharged therefrom by the managers.”

I think that there was sufficient before the court, upon the returns to the writs, to demonstrate the jurisdiction of the magistrate over the person of the relator and the subject-matter of the complaint, and that the commitment, in substance and form, was correct and sufficient to show such jurisdiction and the legality of the proceedings. (*People ex rel. Danziger v. P. E. House of Mercy, supra.*) The loose statements of the magistrate, that the conviction of the relator was for disorderly conduct, cannot alter the facts, nor affect the validity of the relator’s commitment; unless the charge of being

"a public prostitute" constitutes no offense under the law; or unless the committing magistrate was without power to try and to commit the relator. No other question is raised by the relator, upon this appeal, and no other question is to be considered. However advisable and right that, in such cases, the committing magistrate should reduce and preserve all of the evidence, in writing, (*People v. Giles*, 152 N. Y. 136) under the present circumstances, it is not material error; inasmuch as the evidence given by the relator herself is returned, showing that she confessed to being guilty of the charge made in the complaint. The affidavit, upon which the writs issued, contains no allegation that the judgment was unsupported by evidence and the demurrer does not raise such a question; nor were the material facts, appearing in the return, controverted. The questions, solely raised and to be considered in this case, are, first, whether the omission to state, in the complaint and commitment, in the words of the statute, that the relator was "a common prostitute" was fatal to the validity of the warrant, and, second, whether an offense was charged upon which the committing magistrate had power to try and to commit.

As to the first question, I entertain no doubt but that the words, "a public prostitute," are the legal equivalents of "a common prostitute." The word "public," in its common acceptation and use, has all the significance of, and is synonymous with, "common." A woman, who prostitutes her person to the public use, prostitutes it to the common use. While the precise language of a penal statute should be employed, it is not, necessarily, substantial error when other words happen to be used, which have the same accepted and popular sense as those used in the statute. No different meaning can be imported into the term "public prostitute" than attaches to that of "common prostitute."

Was there an offense charged and did the committing magistrate have the power to commit, upon proof thereof? I think that to be "a common prostitute" was made a new offense by this statute. It created a new offense, because it provided

that, upon conviction of the female for committing the act specified, she might be deprived of her liberty and might be detained in the custody of one of certain state institutions for a period of three years; the sentence being indeterminate, in the sense that she might be sooner discharged by the board of managers. Prior thereto, under section 887 of the Code of Criminal Procedure, a common prostitute was classified with vagrants. In this statute the legislature has exercised its wide police powers, undoubtedly, with the intent of promoting the public health and morals, and this State Charities Law is a scheme for the correction of an evil; whose further aim is the reformation of the offender. It was competent, to that end, to make it an offense to be a public, or common, prostitute and to provide that, where a female was convicted thereof, she should be punished, not in a strictly penal sense, but through a restraint of her person, by being delivered into the custody of one of the reformatory institutions of the state, if she appeared to be morally and physically capable of being benefited by discipline, for a reasonable period of time. The operation of the act was, clearly, not intended to be so much punitive, as preventive, in its aims. The offender was to be withdrawn from the community and confined where she would, not only, be unable to continue her vile conduct to the detriment of the public morals and, possibly, of the public health; but where she might be, herself, reformed and made a fit member of society. The proceeding for her commitment, upon conviction of the offense, was not criminal in its nature; it was preventive and reformatory in the interests of organized society. It is plain to my mind that, in the enactment of these provisions of the State Charities Law, the legislature has made that an offense against the law, which was not such before, and that it has conferred upon "any magistrate," which includes, of course, a city magistrate, jurisdiction to convict a female, charged with the offense, and, in a proper case, having regard to her mental and physical conditions, to commit her to one of the institutions mentioned, for the prescribed period of three years, or until discharged by the board

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of managers. The earlier acts, of which this general law is a codification and extension, expressly authorized "all justices of the peace, police justices and other magistrates and courts" to sentence and commit (Ch. 187, Laws of 1881; ch. 233, Laws of 1890).

For these reasons I dissent and I think there should be a reversal of the orders below.

PARKER, Ch. J., HAIGHT, VANN and CULLEN, JJ., concur with WERNER, J.; GRAY, J., reads dissenting opinion; MARTIN, J., absent.

Order affirmed.

MAURICE W. DESHONG, Appellant, v. THE CITY OF NEW YORK, Respondent.

1. MUNICIPAL CORPORATION—PRIVATE USE OF PUBLIC STREETS—PRESUMPTION ARISING FROM LAPSE OF TIME THAT USER IS WITH CONSENT OF THE PUBLIC AUTHORITIES MAY BE DISPELLED BY PROOF. Where a vault has existed under a sidewalk for more than twenty years and no objection has been made, as between the owner and a third person, it will be presumed that it was originally constructed with the assent of the public authorities, and the same presumption will obtain as against a municipality if there is no proof to overcome it. This presumption is not that the owner or his grantors acquired any right to the use of the street by prescription or without the consent of the proper authorities, but that from such use it might be presumed that the proper consent was given. It is, however, a presumption only which may be dispelled by proof. It is not a presumption of a grant of the title or of a permanent right in the street, as no power exists in the authorities to make such a grant or to confer any such right. The title to the streets being in the city as trustee for the public, no grant or permission can be legally given which will interfere with their public use. The right of the public to the use of the streets is absolute and paramount to any other. A presumption of or even an actual consent by the authorities to their use for private purposes is always subject and subordinate to the right of the public whenever required for public purposes, and such a grant or right cannot be presumed when it would have been unlawful.

2. NEW YORK CITY—RECONSTRUCTION OF VAULT UNDER SIDEWALK—WHEN PAYMENT FOR PERMIT INVOLUNTARY. A payment made by an abutting owner to municipal authorities for a permit to reconstruct a vault under a sidewalk in the city of New York, enforced by threats of

arrest and by taking possession of his property, is, if such authorities had no authority to exact it, not so far voluntary as to prevent him from maintaining an action for its recovery.

3. WHEN RECONSTRUCTION MAY BE MADE WITHOUT PERMIT OR ADDITIONAL COMPENSATION. Assuming that a proper permit had been previously granted him for the construction of the old vault, such owner has the right to continue the new vault without an additional permit or further compensation, subject, however, to the condition that its continuance will not interfere with the street or impair its use by the public.

4. COLLATION OF STATUTES RELATING TO USE OF PUBLIC STREETS FOR VAULTS. Statutes relating to the use of public streets in the city of New York collated and discussed, showing that from 1857 there has been continuous authority in the boards and officers mentioned therein to give permits for building and repairing vaults, and that since 1859 such permits and the applications therefor have been required to be in writing and to be kept in the proper office.

5. WHEN PRESUMPTION OF LAWFUL USER IS DISPELLED BY PROOF — QUESTION OF FACT. Where the plaintiff in such an action fails to prove the requisite written permit for the construction of the old vault, but relies upon the fact that it had been in existence since 1876, at least twenty-one years prior to the commencement of the action, without protest or interference from the city authorities, while a presumption is created that a permit was given by them, where there is proof that records of such permits were kept and that there was no record or index of any such permit in the proper office, the presumption is dispelled, or at least a question of fact arising upon conflicting evidence is presented, which if found against the plaintiff will preclude his recovery.

Deshong v. City of New York, 74 App. Div. 234, affirmed.

(Argued October 21, 1903; decided November 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 24, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles G. Cronin and *Thomas O'Callaghan, Jr.*, for appellant. Where it is undisputed that a vault has been maintained and in constant actual use for upwards of forty years, the law will presume that it was originally constructed with the knowledge and assent of the public authorities.

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Opinion of the Court, per MARTIN, J.

(*People ex rel. Zeigler v. Collis*, 17 App. Div. 442.) It is to be presumed that if the old vaults were constructed without authority, the public officers would have performed their duty and would have prevented any encroachment on the public street. Such a presumption obtains in favor of public officers. (*Babbage v. Powers*, 130 N. Y. 281.) Long user, without any objection by the city authorities, is presumptive evidence of consent on their part, without regard to the city ordinances. (*Jorgensen v. Squires*, 144 N. Y. 280.) It was not incumbent upon the plaintiff to show that a permit for this areaway or vault had ever been issued. (*Babbage v. Powers*, 130 N. Y. 292; *Chicago City v. Robbins*, 2 Black, 418; *Robbins v. Chicago City*, 4 Wall. 657; *Jennings v. Van Schaick*, 108 N. Y. 530.) The payment for the area covered by the old vault was not voluntary, but was the result of coercion and duress exercised by the city authorities, and wholly unlawful. (*Stenton v. Jerome*, 54 N. Y. 480; *Scholey v. Mumford*, 60 N. Y. 498; *Peyser v. Mayor, etc.*, 70 N. Y. 501; *Bruescher v. Portchester*, 101 N. Y. 240; *Redmond v. Mayor, etc.*, 125 N. Y. 632; *Tripler v. Mayor, etc.*, 125 N. Y. 617; *Freeman v. Grant*, 132 N. Y. 28; *Poth v. Mayor, etc.*, 151 N. Y. 16; *Æ. Ins. Co. v. Mayor, etc.*, 153 N. Y. 331.)

George L. Rives, Corporation Counsel (*Theodore Connolly* and *W. B. Crowell* of counsel), for respondent. The public records fail to show that vault permits had ever been issued for the space in question and rebut the presumption of an ancient vault. (*Hall v. Kellogg*, 16 Mich. 135; *Owings v. Speed*, 5 Wheat. 420; *Denning v. Roome*, 6 Wend. 651; *Power v. Vil. of Athens*, 99 N. Y. 592.) The payment made under protest was for the plaintiff's convenience, and he intended to immediately sue and recover it after finishing his building. (*Flower v. Lance*, 59 N. Y. 603; *N. S. Bank v. Town of Woodbury*, 173 N. Y. 55.)

MARTIN, J. This controversy relates to the right of the plaintiff to build and maintain a vault under the sidewalk in

front of lots numbers 54 and 56 West Third street, in the city of New York. In 1898 the buildings which had been previously erected thereon were torn down and a new building was in process of construction. When the old buildings were removed there was a vault under the sidewalk in front. It had existed there from the year 1876, and from a time between 1860 and 1870 there had been a small one under the sidewalk, used for storing coal, which was not connected with the building. When the plaintiff commenced to rebuild the vault by constructing new walls inside the old ones, and putting in iron beams upon which the sidewalk was to rest, the public authorities of the city refused to allow him to proceed until he had procured a written permit. The commissioner of highways, having charge of the streets including vaults therein, decided that the plaintiff was required to procure a permit for the erection of such vault and to pay the city therefor the sum of nine hundred and fourteen dollars. This he paid under protest and brought this action to recover the amount. The defendant relied upon two defenses: *First*, that there was no coercion or duress by the city in obtaining such payment, and, therefore, it was voluntary; and, *second*, that no permit was ever issued for the old vault, and, consequently, the plaintiff had no right to build a new one without a proper permit and paying the usual compensation therefor.

The first question is whether the payment sought to be recovered was voluntary, or whether it was made under circumstances entitling the plaintiff to recover. The undisputed proof was that while the new vault was being constructed a deputy or inspector of the department of highways came to the place, stated to the plaintiff that his men must stop work, and declared that if they continued he would have the plaintiff and all the men who were at work arrested. He then called two men to guard the place and stationed a policeman there to stop the work upon the ground that the plaintiff had no permit and would not be allowed to proceed until one was obtained. To avoid arrest and to retain possession of the property so that the building and its appurtenances might be

completed and occupied the plaintiff was required to pay the sum of nine hundred and fourteen dollars, which he did under protest. Payments coerced by duress or unlawful compulsion may be recovered back. The coercion, however, must be illegal, unjust or oppressive. One of the several and perhaps most common instances of duress is by threats of actual imprisonment unless the required act shall be performed. While there may be a diversity of opinion in some of the reported cases as to what circumstances are sufficient to constitute such coercion as will enable a party paying under protest to recover, still, under the facts in this case we think it is quite apparent that the amount demanded of the plaintiff was paid under such circumstances as would enable him to recover, if neither the city nor its officers had authority to charge or demand it. If the city made the charge and demanded its payment without authority of law it was void, and the action of its officers in enforcing it by threats of arrest and by taking unlawful possession of the plaintiff's property was illegal and payment by him was not so far voluntary as to prevent a recovery in this action. (*Briggs v. Boyd*, 56 N. Y. 289; *Scholey v. Mumford*, 60 N. Y. 498; *Newman v. Bd. Supervisors Livingston Co.*, 45 N. Y. 676; *Strusburgh v. Mayor, etc., of N. Y.*, 87 N. Y. 452; *Horn v. Town of New Lots*, 83 N. Y. 100; *Matter of Home P. S. F. Assn.*, 129 N. Y. 288; *Freeman v. Grant*, 132 N. Y. 22, 28; *Talmage v. Third Nat. Bk.*, 91 N. Y. 531, 536; *Peyser v. Mayor, etc., of N. Y.*, 70 N. Y. 497; *Etna Ins. Co. v. Mayor, etc., of N. Y.*, 153 N. Y. 331.) Therefore, we are of the opinion that the contention of the defendant that the judgment can be upheld upon the ground that the payment by the plaintiff was voluntary, cannot be sustained.

It seems to have been assumed by both parties that if a proper permit had been previously granted the plaintiff had a right to continue his new vault in place of the old one without an additional permit or further compensation. With this assumption we are disposed to agree subject, however, to the condition that its continuance would not interfere with the

street or impair its use by the public. Whenever the existence of a vault would interfere with the public use of the street, the right to maintain it must be held to terminate, as the rights of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public. Before entering upon the discussion of the question whether a permit had been issued for the old vaults, a brief history of the statutes and ordinances relating to the subject seems necessary to ascertain the powers of the city and the rights of the plaintiff, so far as they are controlled by either.

So far as appears the first legislative permission for the use of public streets in the city of New York for vaults was given by chapter 446 of the Laws of 1857, which conferred upon the Croton aqueduct board charge of issuing permits for street vaults. (§ 24.) After the passage of that act it was provided by the revised ordinances of 1859 that no person should cause or procure any vault to be constructed or made in any of the streets in the city without the permission of the Croton aqueduct board, and that every application for such permission should be in writing and signed by the person making the same. In 1866 the same ordinances were continued. The Croton aqueduct board had control of this subject until the adoption of the charter of 1870. (L. 1870, ch. 137.) The latter act gave the common council power to make ordinances in relation to the construction, repairs and use of vaults, conferred upon the department of public works the power theretofore vested in the Croton aqueduct board and provided that such department should have cognizance and control of street vaults. (§ 21, subdiv. 20, §§ 77, 78.) In 1873 (L. 1873, ch. 335) the common council was given power to make, continue, modify and repeal such ordinances, regulations and resolutions as might be necessary to carry into effect all powers then vested in or by that act conferred upon the corporation in relation to the construction, repairs and use of vaults, and that act declared that the chief officer of the department should be known as the commissioner of public works, and should have cognizance and control of street vaults.

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(§ 17, subdiv. 18; § 70; § 71, subdiv. 8.) In 1880 the ordinances of the city were again revised or compiled and provided that the commissioner of public works on application was empowered to give permission to construct any vaults or cisterns in the streets, provided, in the opinion of the commissioner, no injury would come to the public thereby. They forbade the building or construction of any vault or cistern without the written permission of the commissioner of public works, and then declared that every application for such permission should be in writing, signed by the person making the same, stating the number of feet of ground required and the intended length and width thereof. In 1882 the Consolidation Act was enacted and conferred upon the common council the power to make ordinances in relation to the construction, repairs and use of vaults, etc., and provided that the department of public works should have cognizance and control of street vaults and openings in sidewalks. (§ 86, subdiv. 17; § 316, subdiv. 8.) Then followed the charter of Greater New York which provides that the municipal assembly shall have power to make, establish, publish and modify, amend or repeal ordinances, rules and regulations not inconsistent with that act or the Constitution, in relation to the construction, repair and use of vaults, and gives the commissioner of highways cognizance and control of licensing vaults under sidewalks. (§ 49, subdiv. 17; § 524, subdiv. 5.) The revised ordinances of March, 1897, contained the same provisions in regard to vaults as were contained in the ordinances of 1880.

Thus we find that from 1857 to the commencement of this action there has been continuous authority in the boards and officers mentioned to give permits for building and repairing vaults, and since 1859 every application for such permission has been required to be in writing and signed by the person making the same. Hence, as the old vaults were not shown to have been built before 1876, it is to be borne in mind that these statutes and ordinances were adopted and in force before the old vaults were constructed, and required a written application and permit, which were to be kept in the proper

office. Moreover, it does not appear that there was any officer of the city authorized to verbally consent to the erection or maintenance of such vaults, and the statutes and ordinances requiring such application and permit to be in writing, by implication at least, forbade such verbal consent or permission. There is no claim that the plaintiff or any former owner of the property had the right to build vaults under the sidewalk in the street, without permission from the public authorities and payment for the privilege. Nor is there any direct proof that the permit required was ever granted for the construction of any previous vault.

The single claim of the plaintiff is that there being evidence that a vault or vaults had been in existence at that place for at least twenty-one years, without protest or interference from the city authorities, it is to be presumed that a permit had been obtained, and that the existence of the old vault was lawful. To sustain this proposition, he relies upon the following cases in this court: *Jennings v. Van Schaick* (108 N. Y. 530, 532); *Babbage v. Powers* (130 N. Y. 281), and *Jorgensen v. Squires* (144 N. Y. 280). In discussing a somewhat similar question in the *Jennings* case, it was said: "It does not appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk, but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city." In the *Babbage* case it was in effect held that while the public is entitled to have a street remain in the condition in which it was placed, and whoever, without special authority, materially obstructs it or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a nuisance, yet, when it appears that the act was done with the consent of the proper officials, the rule of liability is relaxed, and that where a vault had been constructed under the sidewalk, and used for nine years, consent to its construction was to be inferred from the acquiescence of the city officials having charge of the city street and power to give such consent, and that in the absence

of a statute regulating the subject, a written consent was not requisite. So in *Jorgensen v. Squires*, it was held that the legislature might authorize a limited use of sidewalks for cellar openings or vaults, and might delegate this power to the municipal authorities, and that where such use had continued for twenty years, without objection, it was presumptive evidence of consent upon their part, and in the absence of affirmative proof of permission, it should be implied, if there was nothing to disprove it. In *People ex rel. Ziegler v. Collis* (17 App. Div. 448) the same doctrine was held. It was there determined that where a vault had been maintained under a sidewalk for thirty years and there was no proof to the contrary, it would be presumed that it was originally constructed with the assent of the public authorities; that where the commissioner of public works had decided that a permit to open the street to repair the same should be granted, he had no right to charge for the privilege, and that the relator was entitled to a mandamus compelling him to grant the permit without such payment.

Where a vault has existed under a sidewalk for more than twenty years and no objection has been made, the doctrine of these authorities seems to justify the conclusion that as between the owner and a third person it will be presumed that it was originally constructed with the assent of the public authorities, and that the same presumption will obtain as against the city if there is no proof to overcome it. This presumption is not that the plaintiff or his grantors acquired any right to the use of the street by prescription or without the consent of the proper authorities, but that from such use it might be presumed that the proper consent was given. It is, however, a presumption only which may be dispelled by proof. It is not a presumption of a grant of the title or of a permanent right in the street, as no power exists in the authorities to make such a grant or to confer any such right. The title to the streets being in the city as trustee for the public, no grant or permission can be legally given which will interfere with their public use. The right of the public to the use

of the streets is absolute and paramount to any other. A presumption of consent or even an actual consent by the authorities to their use for private purposes is always subject and subordinate to the right of the public whenever required for public purposes, and such a grant or right cannot be presumed when it would have been unlawful. (*Donahue v. State of N. Y.*, 112 N. Y. 142.) Moreover, in the cases in this court which are cited, the question arose not between the owner of the adjacent premises and the municipality, but between the owner and a third person, where the latter claimed to recover for personal injuries caused by the negligent or wrongful act of the former. It seems quite evident that the principle which is applicable in such a case is not necessarily controlling or even applicable where the question is between the owner and the city and the former claims a right to the use of the street for which no permit has been given. In other words, there can be no rightful, permanent possession of any part of a public street for private purposes, unless by virtue of an authorized permission of the city, and no length of time will render legal a private interference with a street which is a nuisance, or give the person maintaining it any right to continue it as against the municipality. If, however, we assume that proof that the original vault had been used more than twenty years created a presumption, even against the city, that it was originally constructed with the assent of the public authorities, we are still required to consider and give effect to the evidence tending to show that no such consent was given. The evidence disclosed that there was an office in which records of all such applications and permits were filed and indexed as required by the statutes and ordinances of the city, and that a diligent examination was made of such records from a time anterior to the erection of the old vault and that no permit for building it had been granted or existed. The right to grant such permit was conferred by the legislature in 1857, and that act and the subsequent statutes and ordinances enacted in pursuance thereof require that the application and permit should be in writing, and, therefore, if

any such permit had been granted, the presumption is that it would have been entered or filed in the proper office. (Lawson's Presumptive Evidence, 67; *Leland v. Cameron*, 31 N. Y. 115; *People v. Snyder*, 41 N. Y. 397.) The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence. (*Hull v. Kellogg*, 16 Mich. 135; Lawson's Presumptive Evidence, 75; *Buck v. Barker*, 5 N. Y. St. Rep. 826; *Brown v. Torrey*, 10 J. & S. 1, 4; Code of Civil Procedure, §§ 921, 961.)

Therefore, as neither the plaintiff nor his grantor could acquire any title or interest in the street except in the manner provided by the statutes and ordinances passed in pursuance thereof, it seems quite clear that when the defendant proved that such records were kept and that there was no record or index of any such permit in the proper office, it dispelled the presumption of such consent arising from the previous acquiescence of the officials having the matter in charge, or at least presented a question of fact upon which the evidence was conflicting and which has been conclusively settled by the decisions of the courts below. If these conclusions are correct, it follows that there was no sufficient evidence that a consent to build the old vault had ever been obtained, and, consequently, the plaintiff was required to procure a permit and pay the usual compensation before he could legally construct such new vault.

The judgment should be affirmed, with costs.

PARKER, CH. J., HAIGHT, CULLEN, WERNER, JJ. (and GRAY, J., in result), concur; VANN, J., dissents.

Judgment affirmed.

In the Matter of the Appraisal, under the Transfer Tax Act,
of the Estate of LAURA ASTOR DELANO, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
ARTHUR ASTOR CAREY, Respondent.

1. TAX—SECTION 220 OF TAX LAW, IMPOSING TRANSFER TAX UPON THE EXERCISE OF A POWER OF APPOINTMENT, CONSTITUTIONAL. Subdivision 5 of section 220 of the Tax Law (L. 1896, ch. 908, amd. L. 1897, ch. 284), imposing a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, * * *" is an exercise of legislative power not prohibited by the State or Federal Constitution. A transfer tax is, therefore, properly imposed upon the exercise, by a last will and testament, of a power of appointment derived from a deed executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent.

2. CONSTRUCTION OF STATUTE. The statute applies to all powers of appointment alike, without distinction on account of the method of creation or date of creation. No tax is laid upon the powers, or on the property or on the original disposition by deed, but simply upon the exercise of the power by will as an effective transfer for the purposes of the act; and since the legislature has full and complete control of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will. The fact that there was no statute imposing a succession tax when the power was created is immaterial. That transfer is not taxed; it is the practical transfer through the exercise of the power by will that is taxed, and nothing else.

Matter of Delano, 82 App. Div. 147, reversed.

(Argued November 10, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 17, 1903, which reversed an order of the New York County Surrogate's Court denying a motion to dismiss a transfer tax

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proceeding as to certain property appointed to the respondent herein and dismissed said proceeding.

The facts, so far as material, are stated in the opinion.

George M. Judd and *Edward H. Fallows* for appellant. The taxation of a transfer of property, passing under and by virtue of the exercise of a power of appointment, under the provisions contained in subdivision 5 of section 220 of the Tax Law (L. 1896, ch. 908), as added by chapter 284 of the Laws of 1897, has been sustained by this court. (*Matter of Vanderbilt*, 163 N. Y. 597; 50 App. Div. 246; *Matter of Dows*, 167 N. Y. 227.) A transfer tax imposed upon the transfer of property passing under the exercise of a power of appointment under the provisions contained in said subdivision 5 of section 220 of the Tax Law is not a tax upon property, but a tax upon the right of succession. (*Matter of Dows*, 167 N. Y. 227.) The Surrogate's Court of New York county has, for the purposes of the imposition of a transfer tax, jurisdiction over the transfer of the property that Laura Astor Delano by and in her last will and testament appointed to Arthur Astor Carey. (*Matter of Ullman*, 137 N. Y. 406; *Weston v. Goodrich*, 86 Hun, 194; *Matter of Wolfe*, 137 N. Y. 205; *Matter of Fitch*, 39 App. Div. 609; *Amherst College v. Ritch*, 151 N. Y. 282.) The property over which Laura Astor Delano by her last will and testament exercised the power of appointment granted her under the certain deeds of 1848 and 1849 is subject to the provisions contained in subdivision 5 of section 220 of the Tax Law. (*Matter of Seaver*, 63 App. Div. 283; *Matter of Walworth*, 66 App. Div. 171; *Matter of Potter*, 51 App. Div. 212; *Matter of Rogers*, 71 App. Div. 461.) The contention that the power of appointment granted to Laura Astor Delano having been created by instruments executed prior to the enactment of a Succession Tax Law, any property passing under the execution of said power of appointment is not taxable under the provisions contained in said subdivision 5 of section 220 of the Tax Law, cannot be sustained.

(*Matter of Vanderbilt*, 163 N. Y. 597; *Matter of Dows*, 167 N. Y. 227; *Matter of Potter*, 51 App. Div. 212; *Matter of Seaver*, 63 App. Div. 283; *Matter of Rogers*, 71 App. Div. 461.) The contention that for the purpose of the imposition of a transfer tax and within the meaning of said subdivision 5 of section 220 of the Tax Law, the property over which Laura Astor Delano by will exercised the power of appointment in favor of Arthur Astor Carey was transferred to Arthur Astor Carey not by and under the will of Laura Astor Delano, but by the certain deeds of 1848 and 1849, is not sound nor tenable. (*Matter of Seaver*, 63 App. Div. 283; *Matter of Dows*, 167 N. Y. 227.) The contention that the power of appointment exercised by Laura Astor Delano, having been created by the certain deeds of 1848 and 1849, any property passing under the exercise of said power of appointment by and under the will of Laura Astor Delano is not taxable under said subdivision 5 of section 220 of the Tax Law, cannot be sustained. (*Matter of Dows*, 167 N. Y. 227.) Any rights whatsoever which may have vested in Arthur Astor Carey by and under the certain deeds of 1848 and 1849 are inferior to the taxing rights of the state over the transfer of the property appointed by the will of Laura Astor Delano in favor of Arthur Astor Carey. (*Matter of Vanderbilt*, 50 App. Div. 246; *Matter of Dows*, 167 N. Y. 227; *Orr v. Gilman*, 183 U. S. 278.)

Lucius H. Beers for respondent. The legislature either did not intend to make the Transfer Tax Law retroactive, or, where that intention has been apparent, provisions to that effect are unconstitutional. (*Matter of Seaman*, 147 N. Y. 69; *Matter of Pell*, 171 N. Y. 48; *Matter of Vanderbilt*, 50 App. Div. 246.) The amendment of 1897 does not apply to powers created by instruments which went into effect prior to the passage of the act. (*Matter of Seaman*, 147 N. Y. 69.) The amendment of 1897 does not apply to cases where the power to appoint was created by a deed, unless the deed was one made in contemplation of the death of the grantor. (*People ex rel. v. McClave*, 99 N. Y. 83.) The Surrogate's

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Court has no jurisdiction to assess a tax upon the property originally transferred by the deeds of 1848 and 1849. (*Matter of Smith*, 40 App. Div. 481; *Matter of Enston*, 113 N. Y. 174; *Matter of Vassar*, 127 N. Y. 1; *Matter of Stewart*, 131 N. Y. 274, 282; *Matter of Swift*, 137 N. Y. 77, 86; *Matter of Fayerweather*, 143 N. Y. 114; *Matter of Crerar*, 56 App. Div. 479; *Matter of Fitch*, 160 N. Y. 87; *Matter of Embury*, 19 App. Div. 214.) If the amendment of 1897 imposed a tax on the respondent's property, it impaired the obligation of a contract made before the Tax Law was adopted, and is, therefore, unconstitutional. (*Root v. Stuyvesant*, 18 Wend. 257; *Matter of Pell*, 171 N. Y. 48; *Matter of Vanderbilt*, 172 N. Y. 69; 3 Pars. on Cont. [7th ed.] 481; *Varick v. Briggs*, 22 Wend. 543; *Van Rensselaer v. Ball*, 19 N. Y. 100; *People ex rel. v. Common Council*, 140 N. Y. 300; *Fletcher v. Peck*, 6 Cranch, 87; *Murray v. Charleston*, 96 U. S. 432; *Forster v. Scott*, 136 N. Y. 577.) If the amendment of 1897 applies to this case, it is unconstitutional under section 24 of article 3 of the New York Constitution. (*Matter of McPherson*, 104 N. Y. 306.)

VANN, J. This appeal presents the question whether the legislature is prohibited by the Constitution, State or Federal, from passing an act to impose a transfer tax upon the exercise, by a last will and testament, of a power of appointment derived from a deed, executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent.

The facts out of which this question arose are as follows: On the 30th of September, 1848, William B. Astor owned a house and lot on Lafayette place, in the city of New York, and on that day he conveyed the same to his daughter, Mrs. Laura Delano, for life, and upon her death, without issue, to her brothers and her sister Alida, or their issue as they might then survive, *per stirpes*.

By the same deed he conferred upon Mrs. Delano a power of appointment, to be exercised, in her discretion, by an

instrument "in its nature testamentary," in such a manner as "to give the said land and premises, or any share or part thereof, to and amongst her said * * * brothers and sister Alida, or their issue, in such manner and proportions as she may appoint."

On the 6th of September, 1849, said William B. Astor transferred certificates of the public debt of the state of Ohio, amounting to \$50,000, to James Gallatin and another, in trust to receive the income and apply it to the use of his daughter Laura during her life, and upon her death without issue to transfer "the capital of the said stock * * * to her surviving brothers and sister Alida" or their issue then surviving. This gift was also subject to a power of appointment created by the trust deed, whereby the said Laura was authorized "by any instrument duly executed as a will of personal estate to dispose of said capital into and amongst her * * * brothers, sister and their issue in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may be lawfully devised."

William B. Astor died on the 24th of November, 1875, about twenty-six years after the date of the last deed, and neither of said instruments was made by him in contemplation of death. Mrs. Delano, his daughter, died June 15th, 1902, without issue, leaving a last will and testament, which has been duly admitted to probate, whereby she exercised the power of appointment contained in said deeds in favor of Arthur Astor Carey, her nephew.

A proceeding was commenced before the proper surrogate to make the usual appraisal for the purpose of assessing a transfer tax upon the property transferred and appointed by the last will and testament of Mrs. Delano, and Mr. Carey was notified to appear. He appeared only for the purpose of objecting to the jurisdiction of the surrogate, from whom he procured an order requiring the executors of Mrs. Delano and the comptroller of the state to show cause why the proceeding should not be dismissed as to him for the want of jurisdiction. The surrogate denied the motion, but upon appeal to the

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Appellate Division his order was reversed and the proceeding was dismissed as to Mr. Carey. The comptroller appealed to this court.

Article 10 of the Tax Law relates to taxable transfers, and embraces sections 220 to 242 inclusive. Section 220, as amended in 1897, imposes a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; * * *." (L. 1897, ch. 284, § 220, subd. 5.)

The learned Appellate Division held that the statute, as amended, applied to the property in question, but that the appointee took under the deeds and not under the will, and the attempt of the act to impose a tax upon the property under the guise of a tax upon succession, was retroactive and unconstitutional.

The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The power in this case was exercised by will, in such a way that the appointee became entitled to all the property, instead of an aliquot part. While the property came to him by deed from his grandfather, only a part of it could have reached him but for the will of his aunt. His title to the most of it depended on the will, as well as upon the deed. He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice. The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property

affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others. The legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition, independent of the date or origin of the power. All this necessarily flows from the absolute control by the legislature of the right to make a will. (*Matter of Sherman*, 153 N. Y. 1, 4; *Matter of Dows*, 167 N. Y. 227, 231; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283; *United States v. Perkins*, 163 U. S. 625, 628; *Mager v. Grima*, 8 How. [U. S.] 490, 493.)

We do not regard the question presented as open in this court, for we have recently passed upon it in two cases, each of which arose under the statute as amended in 1897. In the earlier case a testator, who died in 1885, created a trust fund and gave the income thereof to his son during life, but directed that upon his death the principal should be paid to his issue in such shares or proportions as he should by will appoint, with a gift directly to such issue if the power of appointment was not exercised. The son died in 1899, leaving a will by which he exercised the power. We held, adopting the opinion of the court below, that, although the ultimate right of succession to the fund was not taxable under the statute in force when the father died, still the shares of the appointees under the son's will were subject to a transfer tax under the act of 1897. (*Matter of Vanderbilt*, 50 App. Div. 246; 163 N. Y. 597.)

In the second case the testator died in 1880, after devising certain real property in trust to pay the income to his son during life and upon his death said realty was to vest absolutely and at once in such of his children and the issue of his deceased children as he should by will appoint. If, however, the son should die intestate, the realty was to vest absolutely and at once in his children then living and the issue of his deceased children. The son exercised the power by his last will and died in 1899. We held that the property was sub-

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ject to the tax imposed by the act of 1897; that such tax was on the right of succession and not on the property; that whatever may be the technical source of title of a grantee under a power of appointment, in reality and substance it is the execution of the power that gives to the grantee the property passing under it and that when the father devised the property to the appointees under the will of his son he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. (*Matter of Dows*, 167 N. Y. 227; affirmed, *sub nom. Orr v. Gilman*, 183 U. S. 278.)

The Supreme Court of the United States reviewed our decision, and after due consideration of the statute in question, was unable to see that as construed by us it infringed any provision of the Federal Constitution.

The learned judges below did not consider the *Dows* case in their opinion, but they attempted to distinguish the *Vanderbilt* case from the one in hand upon the ground that the power of appointment was created by will and that the will was made after the enactment of the Collateral Inheritance Tax Law. The latter distinction did not exist in the *Dows* case, where the power was created before any act was passed in this state providing for the imposition of a succession or transfer tax.

We think neither distinction is well founded. As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee by her will to divest certain defeasible estates and to vest them absolutely in one person. If this authority had

been conferred by will, instead of by deed, the right to act would have been precisely the same and the power would have neither gained nor lost in force. The statute applies to all powers alike, without distinction on account of the method of creation or the date of creation, and provides that the exercise of the power shall be deemed a taxable transfer of the property affected, the same as if it had belonged absolutely to the donee of the power and had been bequeathed or devised by such donee. As we said through Judge CULLEN in the *Dows* case: "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." This accords with the statutory definition of a power as applied to real estate, for it includes authority to create or revoke an estate therein. (Real Property Law, § 111.) Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. If the power had been exercised by deed, a different question would have arisen, but it was exercised by will and owing to the full and complete control by the legislature of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will.

It is quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else. The right of the legislature to impose a tax on the privilege of exercising a power by will is not affected by the fact that no such tax was imposed when the power was created. When the creator of the power granted the property to the appointees

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of his daughter, as Judge CULLEN said in the *Dows* case, "he necessarily subjected it to the charge that the state might impose on the privilege accorded to the" daughter "of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate by the" daughter herself, "that is, for the privilege of succeeding to property under a will." If the power had not been exercised, the question would have resembled that presented by the *Pell* case, relied upon below, where we held that a statute was unconstitutional which imposed a tax upon such remainders, already vested and non-defeasible, as should result in an absolute title after the passage of the act. (*Matter of Pell*, 171 N. Y. 48.) In that case the transfer was completed without the aid of a will and the effect was the same as a deed *inter vivos*. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will.

We think that the surrogate had jurisdiction and that his order denying the motion to dismiss the proceedings as to the respondent was proper. It follows that the order of the Appellate Division should be reversed and that of the surrogate affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT and CULLEN, JJ., concur; O'BRIEN and WERNER, JJ., dissent.

Order reversed, etc.

HENRY SUNDHEIMER, Appellant, v. THE CITY OF NEW YORK,
Respondent.

1. TRIAL — DIRECTION OF VERDICT, WHEN IMPROPER. The direction of a verdict in any case, where the right of trial by jury exists, constitutes reversible error if the evidence presents a question of fact.

2. EVIDENCE PRESENTING QUESTION OF FACT. The evidence upon the trial of an action to recover damages sustained to plaintiff's premises by flooding, alleged to have been caused by defendant's negligence in the construction and maintenance of a sewer, examined and held to present a question of fact which should have been submitted to the jury.

Sundheimer v. City of New York, 77 App. Div. 53, reversed.

(Argued November 11, 1903; decided November 24, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 23, 1903, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Augustus Van Wyck and *Jacob Friedman* for appellant. This being an appeal from a direction of a verdict by the court, the appellant is entitled to the most favorable inferences deducible from the evidence, and all contested facts are to be deemed established in his favor. (*Ladd v. Ins. Co.*, 147 N. Y. 478; *McDonald v. M. St. R. Co.*, 167 N. Y. 66.) The evidence suggests many questions of fact which the jury should have been permitted to pass upon in relation to the construction, maintenance and use of the sewer system and catch basins. (*Volkman v. M. R. R. Co.*, 134 N. Y. 418; *Ware v. Dos Passos*, 162 N. Y. 282.)

George L. Rives, Corporation Counsel (*Theodore Connoly* and *Terence Farley* of counsel), for respondent. The record is destitute of any competent proof that the sewer was wrongfully, improperly, carelessly and negligently constructed and built. (*Munk v. City of Watertown*, 67 Hun, 264; *Hughes v. City of Auburn* 21 App. Div. 319; *Martin v. City of Brooklyn*, 32 App. Div. 412; *Munn v. City of Hudson*, 61 App. Div. 348; 1 S. & R. on Neg. [5th ed.] § 271.)

BARTLETT, J. This action was brought to recover for injury to personal property caused by the flooding of the premises No. 716 East 169th street, between Washington and Park avenues, in the borough of the Bronx, city of New York, on the 24th day of August, 1901.

The sole question presented by this appeal is whether the plaintiff offered any evidence that should have been submitted to the jury.

The plaintiff, in attacking the judgment dismissing the com-

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plaint, is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in his favor. (*Ladd v. Aetna Ins. Co.*, 147 N. Y. 478, 482; *Higgins v. Eagleton*, 155 N. Y. 466; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 349; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 208; *McDonald v. Metropolitan Street Railway Co.*, 167 N. Y. 66; *Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345, 347.)

In the latter case the court said: "The defendant in its effort to sustain the judgment is confronted by the rule so frequently laid down in this court that we have nothing to do with the weight of evidence; that if a question of fact is fairly presented it should have been submitted to the jury.

"In a very recent case (*McDonald v. Metropolitan Street Railway Co.*, 167 N. Y. 66) this court reviewed the authorities and approved the rule laid down in *Colt v. Sixth Ave. R. Co.* (49 N. Y. 671) as follows: 'It is not enough to justify a nonsuit that a court on a case made might in the exercise of its discretion grant a new trial. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit, and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial.'

"In *Bagley v. Bowe* (105 N. Y. 171, 179) the rule is thus stated by Judge ANDREWS: 'The trial court or the General Term is authorized to set aside a verdict and direct the issue to be retried before another jury, if in its judgment the verdict is against the weight or preponderance of evidence, but in a case which of right is triable by a jury the court cannot take from that tribunal the ultimate decision of the fact, unless the fact is either uncontradicted or the contradiction is illusory, or where, to use a current word, the answering evidence is a 'scintilla' merely.'"

Stated in brief, the plaintiff sought to recover upon three principal grounds: (1) That the whole sewer system involved in this action, which is known as the Mill brook watershed,

containing from fifteen hundred to two thousand acres, was inadequate both in original construction and also in maintenance; (2) that the catch basins were insufficient in number and size; (3) that the catch basins and sewers were negligently allowed to remain in an improper condition, by reason of being clogged with earth, sand and other foreign matter to such an extent that they were incapable of carrying off the water in heavy rain storms.

The contents of the sewer in East 169th street flows westwardly into what is known as the Webster avenue trunk sewer, which runs southerly for six miles and empties into the Bronx Kills at the east mouth of the Harlem river. The Webster avenue trunk sewer terminates some two miles north of the Harlem river, at which point it discharges into the Brook avenue sewer. The trunk sewers were constructed in sections and at different times; the Brook avenue was completed to 165th street in 1879; the Webster avenue to 184th street in 1885 and to 205th street, the northerly limit of the water shed, in 1899; in the spring or summer of 1900 the Williamsbridge sewer system, covering several hundred acres and not being a part of the Mill brook water shed, was connected with the Webster avenue trunk sewer. The Webster and Brook avenue sewers aggregated some six miles in length, and with the lateral sewers of the watershed represented a sewer system of about one hundred and seventy-eight miles.

It appears that on the 24th day of August, 1901, it commenced raining at midday and at six P. M. there had been a rainfall of two and forty-seven hundredths inches; between one and two o'clock there fell an inch and eight-hundredths. Another rain storm is involved in this action, which occurred on the fifth day of July, 1901. It commenced raining at one forty-five P. M. and at five P. M. two and ninety-four hundredths inches of water fell; it continued to rain moderately until ten thirty P. M., during which time thirteen-hundredths of an inch more fell.

It is a conceded fact that the portion of East 169th street, in which the flooded premises are located, is much lower

than the surrounding territory. There is a very considerable decline in 169th street from the east, and also a descending grade from the west, making this locality unusually subject to inundation unless a proper sewer system is furnished and maintained.

The contention of the plaintiff is that the flooding on the day in question was not only due to accumulated surface water that the catch basins, by reason of previous clogging, failed to conduct into the sewer, but also to the backing up of the sewer through sinks and water closets into the house.

The defense interposed by the city in its answer reads as follows: "That if any damage arose to the plaintiff, it was occasioned in consequence of a storm of unusual severity in which a very large and unusual quantity of rain fell, and other conditions intervened arising from those circumstances which the defendant had no reason to anticipate and was helpless to guard against."

According to the proofs introduced by the city, it was insisted that the flooding of the premises in question was due wholly to the inability of the catch basins, even if in perfect working order, to carry off the constantly accumulating surface water during a sudden storm, and that the question of the sufficiency of the sewers was in no way involved.

The city also introduced evidence bearing upon the original construction of the sewer system in the Mill brook watershed.

A careful perusal of the record satisfies us that the plaintiff's evidence was sufficient to carry the case to the jury. There was evidence as to previous overflows in this locality and numerous complaints served on the proper city authorities; the earliest of these was in 1896; several witnesses testified to the fact that at the time of floodings, waters set back through the closets and sinks in the houses, as well as flowed over the curb from the street; that the covers of manholes in Webster avenue and 169th street were blown into the air from two to four feet, and a large stream of water followed.

The plaintiff also proved by a civil engineer that the forcing off of the manhole covers was evidence of stoppage in one or

more sewers by foreign material and a backing up of the water therein.

The plaintiff also introduced evidence as to the condition of the catch basins just prior to this storm, tending to show that they were not in working order; also other evidence not necessary to examine in detail.

We express no opinion as to the merits of this controversy, or the weight of the evidence, desiring that the new trial shall proceed under all the issues without prejudice to the rights of either party.

It is clear that under the rule of law already adverted to, the learned trial judge was in error when he refused to submit this case to the jury.

The judgments of the Trial Term and the Appellate Division should be reversed and a new trial granted, with costs to the plaintiff in all the courts to abide the event.

HAIGHT, J. I concur for reversal upon the ground that the evidence presented a question of fact for the determination of the jury, as to whether the defendant was guilty of negligence in failing to exercise reasonable care to keep the sewer and catch basins free from obstruction.

PARKER, Ch. J., O'BRIEN, VANN, CULLEN, WERNER, JJ., (and HAIGHT, J., in memorandum), concur.

Judgments reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CLARENCE G. DINSMORE, Respondent, v. H. FREMONT VANDEWATER et al., Individually and as Members of the Town Board of the Town of Hyde Park, et al., Appellants.

1. HIGHWAYS—NEW YORK AND ALBANY POST ROAD—POWER OF TOWN OFFICERS OF TOWN OF HYDE PARK TO ALTER AND IMPROVE SAME—NOT AFFECTED BY CHAPTER 423 OF LAWS OF 1896. The town board and commissioners of highways of the town of Hyde Park, Dutchess county, having had, under colonial laws and statutes of the state prior to the enactment of chapter 423 of the Laws of 1896, the power to alter and improve the New York and Albany post road, running through

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that town, such power is not restricted or taken away by the latter act, since there is nothing in the provisions thereof that in any manner limits their jurisdiction or powers over that highway, except in one particular, that they are prohibited thereby from authorizing or licensing the laying of any railroad track upon the highway, except to cross the same; they have, therefore, the power, upon the petition of a taxpayer of the town, to authorize an alteration and improvement of a part of said road, lying within the town and within the premises of the petitioner, such improvement to be made by petitioner and at his expense, and upon the satisfactory completion thereof, to accept the road as changed and improved.

2. SAME — POWER OF TOWN OFFICERS OF TOWN OF HYDE PARK NOT RESTRICTED OR AFFECTED BY SECTION 77 OF THE COUNTY LAW, RELATING TO THE ALTERATION OF STATE ROADS. The power of the town board and highway commissioners to authorize the alteration and improvement in question is not restricted or made dependent upon the consent of the board of supervisors of Dutchess county by the provisions of section 77 of the County Law (L. 1892, ch. 686), providing that the board of supervisors of any county may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state, since it is apparent, from an examination of the Colonial Laws (Col. Laws, 1708, ch. 181; 1772, ch. 1536), and the statutes of the state (L. 1770, ch. 31; L. 1797, ch. 48; L. 1818, ch. 83), relating to the laying out, construction and maintenance of the New York and Albany post road and other public highways established prior to 1818, that under the colonial laws as early as 1772, especially in Dutchess county, where the alteration in question was made, commissioners of highways were empowered to alter highways that were deemed inconvenient, and that this power was continued by the state legislature in 1779 and by general laws in 1797 and 1818, and that the same power has been continued until the present day; it follows, therefore, that at the time of the passage of the County Law and of chapter 317 of the Laws of 1882, and even of chapter 83 of the Laws of 1817, the substance of which statutes is contained in section 77 of the County Law, the commissioners of highways of towns had been given jurisdiction over the existing colonial highways, with the power to make such needed alterations therein as should be deemed necessary, and that power has not been taken from them by the County Law.

People ex rel. Dinsmore v. Vandewater, 83 App. Div. 54, reversed.

(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 5, 1903, which annulled a determination of the town board and highway commissioners of the town of Hyde Park alter-

ing and closing a part of the New York and Albany post road in that town.

The facts, so far as material, are stated in the opinion.

Harry C. Barker and *Henry B. Anderson* for appellants. The highway commissioners of the town of Hyde Park have authority to alter the New York and Albany post road. (L. 1890, ch. 586, § 80; *People ex rel. v. Jones*, 63 N. Y. 306; *Gress v. Hilliard*, 85 App. Div. 510; *People ex rel. v. Hildreth*, 126 N. Y. 360; *Engleman v. Longhorst*, 120 N. Y. 332; *Buckholz v. N. Y., L. E. & W. R. R. Co.*, 71 App. Div. 452.) The petition and affidavits on which the writ of certiorari was issued show that all of the provisions of the statute relative to the alteration of highways have been complied with, and that the town authorities acted within the scope of their authority. (*Buckholz v. N. Y., L. E. & W. R. R. Co.*, 71 App. Div. 452; *People ex rel. v. Jones*, 63 N. Y. 306; *Engleman v. Longhorst*, 120 N. Y. 332.) The only question which can be reviewed in this proceeding is the primary one of jurisdiction. (*People ex rel. v. Betts*, 55 N. Y. 600; *People ex rel. v. Brady*, 166 N. Y. 44; *People ex rel. v. Canal Bd.*, 7 Lans. 220; *People ex rel. v. Dewey*, 1 Hun, 529; *People v. Wheeler*, 21 N. Y. 82; *People v. Webb*, 50 N. Y. S. R. 46; *People ex rel. v. Comrs.*, 106 N. Y. 64; *People ex rel. v. Suprs.*, 17 App. Div. 197; *People ex rel. v. Wurster*, 149 N. Y. 549.) The writ of certiorari herein should not have been issued. No cause was shown therefor. (*People ex rel. v. Comrs.*, 93 N. Y. 97; *People ex rel. v. Hayden*, 7 Misc. Rep. 278; Elliott on Roads & Streets [2d ed.], 404, 405.)

Egerton L. Winthrop, Jr., *William Jay* and *Flamen B. Candler* for respondent. The action of the appellants, the town board and highway commissioners, in closing part of the New York and Albany post road and making a new road in its place, was without warrant in law and in violation of the express provisions of the statute. (L. 1896, ch. 423; *People ex rel. v. Wood*, 71 N. Y. 371; *People ex rel. v. Spicer*, 99

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N. Y. 233; *Drake v. State*, 144 N. Y. 417.) If the court, however, should hold that this act of 1896 has no bearing upon section 80 of the Highway Law under which the proceedings of the highway commissioners were taken and that this road is still under the jurisdiction of local authority, then the proceedings to close the same were not in conformity with the proper statute, for the reason that this is a state road, established for over 200 years, which could only be closed in the manner provided for by the law applicable to the altering of a state road. (*R. & L. O. W. Co. v. City of Rochester*, 176 N. Y. 37.)

HAIGHT, J. These proceedings were instituted by a petition on behalf of the relator, a resident taxpayer of the town of Hyde Park, for a writ of certiorari to review the action of the town board and highway commissioners of that town in altering a part of the New York and Albany post road. On the 11th day of October, 1900, one Ogden Mills, a taxpayer of the town, presented an application to the commissioners of highways for an alteration in the New York and Albany post road for a distance of about fifteen hundred feet, running through his premises. It was represented that the proposed change would do away with a bad curve in the old road, avoid a hill and eliminate the danger to horsemen owing to the close proximity of the old road to the railroad. The town board consented to the proposed change and the highway commissioners made an order therefor in accordance with the application, providing that the land forming the bed of the old highway should, upon the completion of the proposed alteration, revert and become the property of the petitioner. Thereupon the new highway was constructed in a substantial manner, trees set upon the sides and the same was accepted by the commissioners of highways, and permit granted to the petitioner to close the old highway.

The learned Appellate Division appears to have reached the conclusion that the action of the local authorities in permitting the alteration was void and unauthorized, by reason

of the provisions of chapter 423 of the Laws of 1896. That act is entitled "An act to preserve forever the New York and Albany post road as a state public highway." The provisions are as follows: "§ 1. The old established road along the valley of the Hudson River from the city of New York to the city of Albany, known as the Albany post road, shall be a public highway for the use of the traveling public forever. § 2. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel. § 3. No trustees of any village or corporation of any city upon its route, or board of commissioners of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect. § 4. This act shall not apply to any portion of said road within the city of New York, nor shall it apply to the road of the president, directors and company of the Rensselaer and Columbia turnpike, nor to the villages of Sing Sing or Peekskill, in Westchester county."

In construing statutes we should have in mind the legislative intent and the purpose sought to be accomplished. It will be observed that there is nothing in the provisions of the statute that in any manner limits the jurisdiction or powers of local officers over the highway except in one particular. By its first and second sections it is provided that it "shall be a public highway for the use of the traveling public forever," and that it "shall be kept open and free to all travelers, and shall not be obstructed in any way." These provisions are but the repetition of the law as it exists with reference to all of the public highways of the state. They are all under the control of the legislature, and are required to be kept open and free to the traveling public forever unless they are discontinued in such manner as the legislature directs. But by the provisions of section three of the act we find express limitations placed upon the board of commissioners of highways of towns or other local officers thereof prohibiting them from

authorizing or licensing the laying of any railroad track upon the highway except to cross the same. Here we have, in clear concise language, disclosed the purpose and evident intent of the legislature. It was not to change the jurisdiction of officers over the care and management of the highway except to prohibit them from permitting the laying of railroad tracks therein, and this is emphasized by the provisions of section four of the act, wherein there is excepted from the operation of the statute, doubtless, for the purpose of permitting the operation of existing or contemplated street railroads, that portion of the highway lying in the city of New York, in certain villages mentioned and the Rensselaer and Columbia turnpike. With this exception the powers of the town board and of the commissioners of highways of the town of Hyde Park remain unimpaired, and, therefore, if they had the power to alter and improve the road prior to the passage of this act, then such power still exists and may be exercised by them.

It is now contended on the part of the respondent that the highway in question was a state road and that the town authorities had no power to alter the same unless authorized by the board of supervisors of the county in accordance with the provisions of section 77 of the County Law. That statute provides as follows: "The board (referring to the board of supervisors) may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state under the same conditions that would govern their actions in relation to highways that have been laid out by local authorities." This is a substantial re-enactment of chapter 317 of the Laws of 1882 which was evidently intended to take the place of chapter 83 of the Laws of 1817, which is as follows: "Whereas, great inconvenience has arisen from the want of authority in the commissioners of highways of the several towns in the state to *alter and amend such highways as are laid out by special acts of the legislature, commonly called state roads*; and in order to prevent application being made to the legislature for every alteration in said roads as are sup-

posed to be necessary — Therefore be it enacted by the people of the state of New York, represented in Senate and Assembly, That it shall be lawful for the commissioners of highways of any town in this state, through which a state road passes, on being applied to by twelve freeholders of such town and with the consent of the commissioners of highways of the adjoining towns through which said road passes, to regulate and alter such road, in the said town, if in their opinion the public good and convenience shall require the same: *Provided, however,* That no such alteration shall alter the general route of the road: *And, also,* That the provisions of the act, entitled ‘an act to regulate highways,’ relative to the alteration and amendment of public roads, shall be held to extend to such alteration, as aforesaid, of any state road.” The recitals preceding the enactment indicate very clearly the purpose sought to be accomplished by the legislation. Numerous special acts of the legislature had been passed, after the organization of the state, laying out what were called state roads. Many of these roads were located and constructed through the agency of state officers with state aid and not by the officers of the locality through which the road was laid out. It was with reference to these highways that the inconvenience arose with reference to needed alterations, and the purpose of the act was to avoid application to the legislature for leave to make every change deemed necessary, by giving the power to make such alterations to the commissioners of highways of the towns upon application of twelve freeholders, etc. But it will be observed that there is nothing in this legislation, or that of chapter 317 of the Laws of 1882, or of section 77 of the County Law, that in any particular purports to limit or deprive commissioners of highways of any of the powers that they theretofore possessed with reference to the altering of highways. It is, doubtless, true that as to highways that have been laid out by special statutes the power of the commissioners of highways to change and alter the same is dependent upon the legislation to which we have referred, and that under the County Law their power is now dependent upon the consent of the board of

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supervisors of the county ; but these highways are limited to those authorized by the special acts of the legislature and do not include such highways as had before been given over to the care of the commissioners of highways of towns with power on the part of the local officers thereof to make needed alterations. This brings us to a consideration of the history of the road in question and the legislation bearing thereon.

The New York and Albany post road was constructed under the provisions of chapter 131 of the Colonial Laws of 1703. It was a general statute entitled "An act for the laying out, regulating, cleaning and preserving public common highways throughout this Colony." It provides as follows: "For the better laying out ascertaining, repairing and preserving the publick comon and general highways within this Colony. Be it enacted by the Govr. council and General Assembly of this Colony and by the Authority of the same. That there be laid out preserved and kept for ever in good and sufficient repair one publick comon & general highway to extend from the now scite of the City of New York thro' the City and County of New York and the county of West Chester of the breadth of four rod English measure at the least, to be continue and remain forever the publick comon general road and highway from the said City of New York to the adjacent Collony of Connecticutt. * * * And one other publick comon general highway to extend from Kings Bridge in the county of West Chester thro' the same county of West Chester Dutchess county and the county of Albany of the breadth of four rod English measure at the least to be continue and remain for ever the publick comon general road and highway from King Bridge aforesaid to the ferry at Crawlew over against the City of Albany." It also contained provisions for the laying out of other roads connecting towns and villages to one another and to such convenient landing places as their situations will afford, "for the better and easier transportation of goods and the commodious passing of travelers as direct and convenient as the circumstances of place will admit of." Commissioners were appointed in the different

localities to carry out the provisions of the act, including New York, Dutchess and Westchester counties, thus laying the foundation upon which our highway laws have been constructed and perfected. Numerous amendments were made from time to time from which the growth of the law is disclosed, which may be interesting as history, but are not essential to be here considered. As early as 1772 we find that in Dutchess county the freeholders and inhabitants of each precinct at their annual town meetings were required to elect three highway commissioners to regulate highways in their precinct. The provision of the law, as far as material, is as follows: "That the commissioners, or the major part of them, in their respective precincts for which they shall be chosen commissioners, are hereby empowered and authorized to regulate the roads already laid out, and *if any of them shall appear inconvenient, and an alteration absolutely necessary*, and the same be certified upon the oath by twelve principal freeholders of the said county, the commissioners may, provided they all judge it necessary, alter the same, and lay out such other public highways and roads as they, or the major part of them shall think most convenient." (Colonial Laws, 1772, chapter 1536.) The next statute to which we call attention is chapter 31 of the Laws of 1779, after the organization of the state government, entitled "an act for the better laying out, regulating and keeping in repair all common public highways and private roads in the counties of Ulster, Orange, Dutchess, Charlotte and West Chester." This statute contains a similar provision to that found in the colonial laws already referred to. It gives to the commissioners of highways the power and authority "to regulate the roads already laid out, and if any of them shall appear inconvenient and an alteration necessary * * * they may be required to alter the same in such manner as a majority of the commissioners in such town, manor, district or precinct shall judge meet and convenient." This act was followed by chapter 43 of the Laws of 1797, a general act covering all of the state except the counties of New York, Suffolk,

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Queens and Kings. In this act the commissioners of highways are given the power "to regulate the roads already laid out and to alter such as they or a majority of them shall conceive inconvenient." This statute, with some amendments, was continued in force until 1813, when it was superseded by the general highway act (Chapter 33 of that year) containing the same provisions, and this, with some amendments, was carried into the Revised Statutes and is now incorporated into our Highway Law. It is thus apparent that under the colonial laws as early as 1772, especially in Dutchess county where the alteration in question was made, commissioners of highways were empowered to alter highways that were deemed inconvenient, and that this power was continued by the state legislature in 1779 and by general laws in 1797 and 1813, and that the same power has been continued until the present day. It, therefore, follows that at the time of the passage of the County Law, or of chapter 317 of the Laws of 1882, or even of chapter 83 of the Laws of 1817, the commissioners of highways of towns had been given jurisdiction over the existing colonial highways, with the power to make such needed alterations therein as should be deemed necessary, and that that power has not been taken from them by the County Law.

The New York and Albany post road appears to have been authorized by colonial legislation two hundred years ago. It was constructed and kept in repair by commissioners appointed in the localities, and for over one hundred and thirty years in Dutchess county it has been under the jurisdiction and control of the local highway officers of that locality, who have had the power to make such alterations as a majority of them should conceive to be convenient for the public. These authorities, in making the alteration complained of, appear to have conformed to the requirements of the statute. The improvement is one that they had the power to make, and it does not appear to us that the relator is concerned with reference to the validity of the title of Mills to the bed of the old highway. We, consequently, do not deem it important to discuss that question at this time.

The order of the Appellate Division should be reversed and the writ of certiorari dismissed, with costs.

BARTLETT, J. (dissenting). The single question is presented by this appeal whether the members of the town board and the highway commissioners of the town of Hyde Park, in the county of Dutchess, had jurisdiction to alter the route of the New York and Albany post road in that town.

The post road was created by chapter 131, Colonial Laws, 1703, and has remained a public highway ever since, a period of two hundred years.

The County Law (§ 77) contained in article 4, defining the duties of boards of supervisors relating to highways and bridges, which is a revision, without material change, of the Laws of 1882 (Chap. 317), provides that "The board of supervisors of any county may authorize and empower the highway commissioners of any town to alter, discontinue, widen, or narrow any road or public highway which shall have been laid out by the state within its boundaries, under the same conditions as would govern their action in relation to public highways that have been laid out by local authorities." (Birdseye's R. S., Vol. 1 [3d ed.], p. 839.)

It is conceded that in the case before us no power was conferred upon the town board and commissioners of highways by the board of supervisors of Dutchess county, but it is argued that the section quoted does not include the post road, for the reason that it was not laid out by the state as now existing.

The act of 1703, laying out the post road and other public highways, starts out with the declaration, "That there be laid out and kept forever," etc. We thus have the post road, a public highway, in the colony of New York, and when the latter achieved its independence the former continued a state public highway under the jurisdiction of the state of New York, and is clearly within the provisions of section 77 of the County Law as properly construed.

It is doubtless true that since the existence of public state

roads in the early days, the colonial assembly did, from time to time, confer the power upon the local authorities of towns to alter, repair and keep in proper condition that portion of a state road lying within the boundaries of a town.

In 1817 (Chap. 83) the policy was changed and the local authorities could only alter a state public highway in a particular town with the consent of the commissioners of highways of the adjoining towns through which it passed.

It is manifest that the legislation of 1882 (Chap. 317), perpetuated in section 77 of the County Law, was a clear expression of the legislative intention to change still further its policy and to delegate to a certain extent its powers in relation to state roads to the board of supervisors in each county, thus placing under the control of the latter all alterations thereof.

It follows that the town board and highway commissioners of the town of Hyde Park were without jurisdiction in the premises until authorized to act by the board of supervisors of Dutchess county.

An evidence of the supervising care of the legislature over state public highways is found in chapter 423, Laws of 1896, entitled "An act to preserve forever the New York and Albany post road as a state public highway." The material portions of this act read as follows :

"SECTION 1. The old established road along the valley of the Hudson river from the city of New York to the city of Albany, known as the Albany post road, shall be a public highway for the use of the traveling public forever.

"§ 2. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel.

"§ 3. No trustees of any village or corporation of any city upon its route, or board of commissioners of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect. * * *

It is argued that sections one and two are but a repetition of the law as it exists, and that the sole object of this act was to prevent the laying of any railroad track upon the post road.

In my opinion the act is very unfortunately worded, including the title, if its sole object was as suggested. The title should have been, "An act to prevent the laying of any railroad track upon the New York and Albany post road," and section three would have sufficed in carrying out this alleged sole object of the act. The fact is that the title of the act is used with entire accuracy — "An act to preserve forever the New York and Albany post road as a state public highway."

Section one makes the post road a state public highway if in law it had not theretofore existed as such.

This act clearly brings the post road within section 77 of the County Law, and renders the authorization of the board of supervisors necessary before the local authorities can alter the route of the same.

I have already stated the reason why the post road has always been a state public highway since the Revolutionary war, but if any legal doubt existed it is set at rest by the act of 1896.

Sections two and three of this act disclose the legislative intention to prevent all interference with the post road as a state public highway, except as the board of supervisors may act under the powers delegated to them under section 77 of the County Law.

I vote for the affirmance of the order of the Appellate Division annulling the action of the town board and highway commissioners of the town of Hyde Park.

PARKER, Ch. J., O'BRIEN, VANN, CULLEN and WERNER, JJ., concur with HAIGHT, J.; BARTLETT, J., reads dissenting opinion.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GARRA K. LESTER, Respondent, v. JOSEPH H. ENO et al., Constituting the Town Board of the Town of Hamburg, Appellants.

CERTIORARI—RETURN TO CERTIORARI TO REVIEW DETERMINATION OF TOWN BOARD MADE BY MAJORITY OF BOARD IS CONCLUSIVE UPON APPELLATE DIVISION—SEPARATE RETURN MADE BY ONE MEMBER OF BOARD CANNOT BE CONSIDERED. Where it appears from the papers and proceedings upon a writ of certiorari, issued to review the determination of a town board in disallowing a claim presented thereto, that the only matter in issue was the employment of the relator by the town board of health to render services as a physician to certain smallpox patients during a certain period, and the return made by a majority of the town board specifically denies such employment and distinctly traverses every allegation of the relator's petition in that behalf, such return is conclusive upon the Appellate Division and the writ should be dismissed, notwithstanding one of the town board made a separate return corroborating the petitioner, since there can be but one return to a writ of certiorari, unless a second is directed or permitted by the court because the first is defective or insufficient in form; and where a writ of certiorari is issued to review the determination of a board or body composed of two or more persons the return must be made in the name of the board or body and may be executed by a majority of the members thereof; the return of the majority of the members is, therefore, the only return which the Appellate Division has the right to consider, and the separate return should be disregarded.

People ex rel. Lester v. Eno, 84 App. Div. 55, reversed.

(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 4, 1903, which sustained a writ of certiorari to review the proceedings of the defendants in disallowing a portion of a claim of relator against the town of Hamburg and directed the audit of such claim in full.

In August, 1902, the relator, a practicing physician of the village of Blasdell, town of Hamburg, Erie county, presented to the town board of that town a claim for services performed by him in caring for certain persons afflicted with the disease

of smallpox. The claim was for services running from April 29th, 1902, to and including May 29th, 1902, and amounting to \$318.95. The town board deducted from the claim as presented the sum of \$110, and audited the same at \$208.95. That part of the claim which was disallowed represented the first eleven days of relator's services at \$10 a day, ranging from April 29th to May 9th, 1902, during which time, it was claimed, the relator had not been employed by the town and that, therefore, the town was not liable. The relator thereupon sued out a writ of certiorari to review the determination of the town board in respect to the part of the claim which had been disallowed. The Appellate Division annulled the determination of the town board, and remitted the matter to that body with directions to audit the relator's claim as presented in his account.

The relator's petition for the writ sets forth, in substance, that on or about the 29th of April, 1902, he discovered that two persons residing in the town of Hamburg were afflicted with smallpox, and that on that day he reported the matter to the health physician of the town who requested him to remain in attendance upon such persons until he could call a meeting of the health board to take action in the matter; that a meeting of that board was called for and held on the following day, April 30th; that at this meeting the health board authorized the relator to take care of such persons and all other persons in the town who should contract the disease and promised to pay him the reasonable value of his services therein; that the relator continued in attendance upon these persons and other persons stricken with the disease, and performed the necessary vaccination, fumigation and quarantining; that the relator's compensation not having been fixed on May 7th, he then wrote a letter to the health board stating that his services were worth \$10 a day and unless that amount was agreed to be paid him he would be unable to continue his services, and asked the board to inform him at once whether they desired to retain his services; that on May 9th the town board duly passed a resolution employing the relator

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to take charge of the persons suffering from smallpox in the town and fixing his compensation at \$10 per day.

Attached to the relator's petition are extracts from the minutes of the health board and the town board referring to the matter of caring for the smallpox patients of the town and the employment of the relator in that behalf. The minutes of the health board disclose that Dr. Bourne, the health physician, reported that he was called by the relator to see two smallpox patients on April 30th, 1902, and that a quarantine should be established over the houses occupied by these persons. A resolution was thereupon adopted directing the removal of the two persons to the pest house, and the establishment of a quarantine upon the houses occupied by them; that on May 3rd, 1902, the health board held another meeting at which it was decided to pay to the health department of the city of Buffalo the sum of \$15 per week for each person sent to the Buffalo pest house from the town of Hamburg under the order of B. S. Bourne, the health officer of that town; that on the 9th of May, 1902, the health board again met and adopted a resolution which, after reciting the establishment of a provisional pest house in the town, provided for the employment of the relator in the following language: "Resolved, that we employ Garra K. Lester as physician to care for all patients sent to said pest house by the health physician of said town, and also to attend all persons quarantined in or near Blasdell, N. Y., until such quarantine shall be raised by the health physician. The said Garra K. Lester shall receive the sum of ten dollars per day for such services and for such time as the health physician shall deem proper. Said Garra K. Lester to furnish all medicines and ointments required by such patients." The minutes of the meeting of the town board on May 9th disclose that the relator's communication of May 7th to the health board was read and an adjournment taken until 3 o'clock in the afternoon of that day. At the adjourned meeting there was some talk as to the employment of a physician and the members of the board not being able to agree upon the matter a recess was taken until

8 o'clock. At this adjourned meeting the town board adopted a resolution identical in language with the resolution of the health board previously adopted on the same day.

The relator's petition is corroborated by the affidavits of Oliver C. Salisbury, a member of both the town and health boards, and Henry J. Danser, a resident of the town.

Five members of the town board, constituting a majority thereof, made a return to the writ issued herein, denying specifically, on information and belief, all the allegations of the petition relating to the relator's employment by the health board previous to May 9th, 1902. There is no denial as to the rendition of relator's services prior to that date, but the return puts in issue the relator's employment and his right to compensation previous to the adoption of the resolution of the town board engaging him to take care of the smallpox patients of the town.

The defendant Salisbury also made a separate return to the writ in which he stated, in substance, that at a meeting of the health board called to consider the matter of caring for the smallpox patients of the town and preventing the spread of the disease, the relator was authorized to care for such patients and others who might contract the disease, and that it was agreed on behalf of the town to compensate him therefor; that the health board authorized him, Salisbury, and the health physician to take all necessary steps to check the disease and that the services of the relator were rendered with the sanction and under the direction of Salisbury and the health physician.

The health physician, however, made an affidavit which was attached to the majority return of the town board, in which he denied that he or Salisbury employed the relator on behalf of the town to care for smallpox patients, and further denied all the allegations of the petition and Salisbury's return relating to the employment of the relator prior to May 9th.

The court upon motion granted leave to the defendants to file a supplemental return controverting the allegations of the

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separate return made by Salisbury, and also permitted the filing of the affidavit of the health physician attached to the original return.

Charles Diebold, Jr., for appellants. The return of the town board is conclusive as to the facts. (L. 1892, ch. 677, § 19; *People v. Webb*, 50 N. Y. S. R. 46; Code Civ. Pro. § 2138; *People ex rel. v. Wurster*, 149 N. Y. 549; *People v. Barker*, 152 N. Y. 417; *People ex rel. v. Bd. of Excise*, 91 Hun, 94.)

Levant D. Lester for respondent. The hearing in this proceeding must be upon the writ and returns and the papers upon which the writ was granted. (Code Civ. Pro. § 2138; *People ex rel. v. Heddon*, 32 Hun, 299; *People ex rel. v. York*, 45 App. Div. 503; Code Civ. Pro. § 2139; *People ex rel. v. Bd. of Auditors*, 39 App. Div. 30; *People ex rel. v. Vanderpoel*, 35 App. Div. 73; *People ex rel. v. Assessors*, 6 Lans. 105; *Lawton v. Comrs. of Cambridge*, 2 Caines, 179; *People v. Davis*, 38 Hun, 43; *People ex rel. v. Police Comrs.*, 55 How. Pr. 454.) The fact that five members of the town board join in a return and designate it the return of the town board does not bind this court to the sole consideration of their return as stating the facts, or even make their return the return of the town board. (Code Civ. Pro. §§ 2129, 2130; *People ex rel. v. Fire Comrs.*, 73 N. Y. 437; *Rector v. Clark*, 78 N. Y. 21; *People ex rel. v. Martin*, 142 N. Y. 228; *Beardslee v. Dolge*, 143 N. Y. 160.) Material allegations of fact in the petition, not controverted by the returns, are presumed to be admitted and must be so regarded on this hearing. (*People ex rel. v. Sutphin*, 166 N. Y. 163; *People ex rel. v. Bd. Suprs.*, 30 How. Pr. 173; Code Civ. Pro. § 2140.)

WERNER, J. In reversing the action of the town board disallowing the relator's claim for services rendered prior to May 9th, 1902, the learned Appellate Division evidently failed to give effect to the rule that the denials and allegations of a

return to a writ of certiorari must be taken as true, so far as they put in issue the material allegations of the petition for the writ. This is clearly shown by the statement in the opinion that "while the return of a majority of the town board to the relator's petition in form denies many of the allegations thereof, we are impressed with the idea that such denial is merely formal and designed mainly for the purpose of raising an issue."

The Code of Civil Procedure (§ 2138) provides that proceedings upon certiorari "must be heard upon the writ and return and the papers upon which the writ was granted," and this court has held that this "does not mean that the court is at liberty to look beyond the return and consider the facts stated in the petition and accompanying papers, unless the return is an admission of those facts, or the equivalent of an admission." (*People ex rel. Miller v. Wurster*, 149 N. Y. 549.) The return must be taken as conclusive and acted on as true. If false in fact the remedy is in an action for false return; if insufficient in form by compelling a further and more specific return. (*People ex rel. Sims v. Bd. Fire Commrs.*, 73 N. Y. 437.) From this brief statement of the law relating to certiorari proceedings, it is apparent that if the denials of the return put in issue the material allegations of the papers upon which the writ was granted, the court below had no power to look beyond the return for the supposed equities of the case.

The foregoing recital of the proceedings herein discloses that the only matter in issue is the employment of the relator by the town of Hamburg to render services in the case of smallpox patients in that town during the period between the 29th of April and the 9th of May, 1902. The return made by a majority of the town board specifically denies such employment, and distinctly traverses every allegation of the relator's petition in that behalf. This was conclusive upon the Appellate Division and the writ should have been dismissed.

Upon the argument before us counsel for the relator contended that as the return of the town board was made by only

a majority of its members and not by all of them, the Appellate Division had the right to consider the separate return of Salisbury, one of the members of the town board, which tended to corroborate the allegations of the relator's petition. We think this contention is not well founded. There can be only one return to a writ of certiorari, unless a second return is directed or permitted by the court because the first one was defective or insufficient in form. If the original return is false in fact the remedy, as we have seen, is an action for a false return. When a writ of certiorari is issued to review the determination of a board or body composed of two or more persons, the return to the writ is to be made in the name of the board or body, and may be executed by a majority of the members thereof. (*People ex rel. Gambling v. Cholwell*, 6 Abb. Pr. 151; *Plymouth v. County Commrs.*, 16 Gray, 341; *People ex rel. Toohey v. Webb*, 50 N. Y. St. Rep. 46.) The provisions of section 2134 (Code Civ. Pro.), directing that "each person upon whom a writ of certiorari is served * * * must make a return," etc., is not in conflict with the view that the return of a body or board may be made by a majority of its members, because the noun "person" is clearly used to denote any person or legal entity to whom a writ is directed. The return of the majority of the members of the town board was, therefore, the only return which the court below had the right to consider, and the separate return made by Salisbury, one of its members, should have been disregarded.

For these reasons the order of the Appellate Division must be reversed and the writ herein dismissed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ., concur.

Order reversed, etc.

SALLY MARIA HOLLY, as Executrix of GEORGE HOLLY, Deceased, Respondent, v. EDWARD GIBBONS, Individually, and as Executor of RANSOM H. GIBBONS, Deceased, Appellant, Impleaded with Another.

1. EQUITY — CREDITOR'S ACTION TO COMPEL EXECUTOR TO SELL REAL ESTATE UNDER POWER OF SALE FOR PAYMENT OF DEBTS. Where the personal estate of a decedent is insufficient to satisfy his debts a creditor may maintain an action in equity to establish his claim and to compel an executor having a testamentary power to sell designated real estate "for the purpose of paying debts," to sell the same and apply the proceeds to the extinguishment of the debt.

2. ACKNOWLEDGMENT BY EXECUTOR PREVENTS RUNNING OF STATUTE OF LIMITATIONS. It is not only the right, but the duty of the executor to discharge the debt, and his acknowledgment thereof, by making payments thereon from time to time, prevents the running of the Statute of Limitations, the principle of the rule that prevents an executor from reviving a debt against the estate of his testator which is barred by the statute having no application to a case where he performs his legal duty in keeping it in force.

3. FORMER ADJUDICATION DISMISSING PROCEEDING FOR AN ACCOUNTING NOT A BAR. A former adjudication of the Surrogate's Court, the only effect of which was to dismiss the creditor's petition for an accounting, containing the statement that the proceeding was "barred by the Statute of Limitations," does not constitute a final adjudication upon the validity of his claim and is not a bar to the maintenance of the action.

4. FAILURE TO LEGALLY SERVE NON-RESIDENT DEVISEE WITH PROCESS FATAL TO JUDGMENT. A devisee under the will, of the real estate directed to be sold, having an interest therein subject to the exercise of the power of sale, is a necessary party to such an action; and where the devisee who was a non-resident was made a party defendant, but by reason of a non-compliance with section 439 of the Code of Civil Procedure was never legally served with process and did not appear, a judgment in plaintiff's favor must be reversed.

5. ERRONEOUS DIRECTION OF SALE BY REFEREE. A direction in the judgment that the real estate be sold through a referee is improper in the absence of an allegation or finding that the executor was unfit or without capacity to execute the power of sale.

Holly v. Gibbons, 67 App. Div. 628, reversed.

(Argued November 17, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 7, 1902, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The plaintiff's testator was the administrator of Betsy Ann Gibbons, who was the widow of Ransom H. Gibbons, and, as a creditor of the latter's estate, upon a promissory note given to his intestate by her husband in his life-time, for the sum of \$2,800, payable one year after date and carrying interest at five per cent, and in his capacity as administrator, he brought this action, with the object of procuring the payment of the claim. He joined as defendants with Edward Gibbons, the executor of Ransom H. Gibbons, the said Edward Gibbons, individually, and Sally Maria Peck, who were the only children of the testator, and the demand of the complaint, variously, is that the executor render an account of his proceedings; that the individual defendants shall be jointly charged with the amount of the testator's debt; that the executor be compelled to exercise the power of sale in the testator's will; that the court shall order a sale of the real estate left by the testator, and that the proceeds of the sale shall be applied in payment of the debt. The answer, admitting that the personal estate was exhausted and is not available for the payment of debts, puts in issue the liability upon the note and sets up, in various ways, the bar of the Statute of Limitations. The answer, also, pleads, in bar of the action, a previous adjudication in the Surrogate's Court. The plaintiff's testator recovered judgment; by which it was, in substance, adjudged that the note was a valid and existing claim against the estate of the testator; that the amount due upon it was recoverable against Edward Gibbons, as executor and individually; that a sale of the real estate of the testator should be made, at public auction, under the direction of a referee therein appointed for the purpose; that from the proceeds of such sale the debt should be paid and that any deficiency should be made good by the defendant,

Edward Gibbons, individually. Upon appeal to the Appellate Division, in the third department, the judgment was modified "by striking therefrom that part thereof relating to the collection of any deficiency after the sale of the real estate from Edward Gibbons, individually, and, as so modified, affirmed." The defendant, Edward Gibbons, individually and as executor, appealed to this court. After the determination by the Appellate Division, the original plaintiff died and the present plaintiff and respondent, as his executrix, was substituted in his place and stead by order.

Testator's will, after making provision for his wife during her life, by the third clause, gave to his son Edward a certain farm, called the "Hnyck farm," "to have and hold forever, unless said Edward shall die without legal issue and in that case the same property to my daughter, Sally Maria, and her heirs." By the fourth clause, he authorizes his executor to sell a certain farm, called the "Jay Gibbons farm," "to the best advantage for the purpose of paying debts and for the interest of my daughter," and, further authorizing his executor to sell the house and lot on which he resided, continues, by saying, "and after the real estate is sold and the debts paid and if there is not over \$4,000, I give to my daughter the said \$4,000, but if there is over \$4,000 I direct that my son and daughter to each share alike in the overplus and in case of my daughter's death to go to her heirs." He, then, appoints his son Edward as the executor of his will. The trial judge made findings; in which he found that the testator paid the interest upon the note, which he had given to his wife, down to the time of his death, in 1885; that his executor acknowledged the validity of the note and paid the interest thereon, until the death of the testator's widow, in 1893; that, when the original plaintiff, her administrator, presented the note to the executor, the latter admitted the validity of the note, promised to pay the same and requested, rather than to have a sale of the real estate, that it should remain as it was; that in such request the plaintiff acquiesced and that the executor paid the interest upon the note down to March,

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1897. He found that the testator left no personal property ; except about two hundred dollars, which had been expended in paying funeral expenses and some small debts of the estate ; that the executor had sold the house and lot, in which the testator resided and which were referred to in the fourth clause of the will, and had applied the proceeds, in 1895, upon the principal and interest of the note and that, in September, 1899, he informed the original plaintiff that he was forbidden to make further payments upon the note and, therefore, should decline to pay the same, or any part of it. Thereupon, as it is further found, this original plaintiff instituted a proceeding before the surrogate of Albany county, in which, as a creditor of Ransom Gibbons' estate, he sought to compel the executor to account as such ; that the executor, in his answer in that proceeding, denied that the petitioner was a creditor and set up the bar of the Statute of Limitations, whereupon the surrogate made a decree, adjudging as follows : "That more than six years and eighteen months having elapsed since the appointment of said Edward Gibbons, as executor, this proceeding to compel the executor to account is barred by the Statute of Limitations," and ordering "that the petition should be dismissed." Upon these facts the conclusions of law followed, upon which the judgment was entered in favor of the plaintiff.

The further fact is to be noticed that Mrs. Peck, the daughter of the testator and who was joined as a defendant, did not appear in the action and that she was a non-resident of the state, upon whom service of the summons and complaint had been made without the state, pursuant to an order to that effect.

Walter E. Ward for appellant. There is no law or practice in this state to support the judgment entered as to the sale of the real estate. (*Platt v. Platt*, 105 N. Y. 488 ; *Hogan v. Kavanaugh*, 138 N. Y. 417 ; *Long v. Long*, 142 N. Y. 545.) There was no legal service of the summons upon the defendant Sally Maria Peck, the court never obtained juris-

diction of her and the judgment is absolutely void as to her, and consequently void as to the sale of the real estate. (Code Civ. Pro. § 438; *MacCrakin v. Flanagan*, 127 N. Y. 493; 141 N. Y. 174; *Orr v. Currie*, 14 Misc. Rep. 74; *Greenbaum v. Dwyer*, 4 Civ. Pro. Rep. 276; *Peck v. Cook*, 41 Barb. 549.) The judgment entered cannot be sustained against the defendants Edward Gibbons and Sally Maria Peck individually as devisees. (Code Civ. Pro. §§ 1837, 1860; *Clift v. Moses*, 116 N. Y. 144.) The cause of action against the defendants as devisees under the will, to charge them with the value of the estate received by them individually, is barred by the six years' Statute of Limitations, which began to run three years after the granting of letters testamentary, or nine years in all. (*Adams v. Fassett*, 149 N. Y. 61; *Burnham v. Burnham*, 27 Misc. Rep. 106; *Mead v. Jenkins*, 95 N. Y. 31.) The debt being barred by the Statute of Limitations as to the devisees, the executor has no right to sell the real estate for the payment of the debt. (*Buller v. Johnson*, 111 N. Y. 204.) The note was outlawed as to all parties long before the commencement of this action. (*Balz v. Underhill*, 19 Misc. Rep. 215; *Bloodgood v. Bruen*, 8 N. Y. 362; *Schultz v. Morette*, 146 N. Y. 137; *Willis v. Sharp*, 115 N. Y. 396; *Platt v. Platt*, 105 N. Y. 488.) The former adjudication in the Surrogate's Court is a complete bar to the maintenance of this action. (*Pray v. Hegeman*, 98 N. Y. 351; *Hyland v. Baxter*, 98 N. Y. 610; *Matter of Denton*, 103 N. Y. 607; *Reich v. Cochran*, 151 N. Y. 122; *Park Hill v. Herriot*, 41 App. Div. 324; *Nichols v. McLean*, 101 N. Y. 526; *Keller v. Vil. of Mount Vernon*, 23 App. Div. 46; *Hollister v. Abbott*, 31 N. H. 442; *Hudson v. Nashua*, 62 N. H. 591; *Harris v. Harris*, 36 Barb. 88.)

John H. Gleason for respondent. The claim in suit was never barred by the Statute of Limitations. (*McLaren v. McMartin*, 36 N. Y. 88; *Heath v. Grennell*, 61 Barb. 190; *Murdock v. Waterman*, 145 N. Y. 55; *Mack v. Anderson*, 165 N. Y. 532; *Matter of Kendrick*, 107 N. Y. 108; *Matter*

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of *Miles*, 170 N. Y. 75.) The action is properly brought and can be maintained against Edward Gibbons alone, as the executor and individually as sole devisee of the deceased debtor. (2 R. S. [9th ed.] 1807, § 96; *Matter of Gantert*, 136 N. Y. 106; *Haight v. Brisbin*, 96 N. Y. 132; *Moncrief v. Ross*, 50 N. Y. 436; *Vonbasckerck v. Herrick*, 65 Barb. 257; *Stewart v. Hamilton*, 37 Hun, 19; Code Civ. Pro. §§ 1815, 1843-1853, 1860, 2759, subd. 4; *Cunningham v. Parker*, 146 N. Y. 29; *Wood v. Wood*, 26 Barb. 356; *De Crano v. Moore*, 30 Misc. Rep. 303; *Adams v. Fassett*, 149 N. Y. 61; *Cole v. Tyler*, 65 N. Y. 73.) The Surrogate's Court had no jurisdiction to determine the petitioner's claim, and its decree dismissing the petition is not a bar to this action. (Code Civ. Pro. § 2722; *Matter of Wagner*, 119 N. Y. 28; *Matter of Callahan*, 152 N. Y. 320; *Matter of Miles*, 170 N. Y. 75; *Matter of Clauss*, 16 App. Div. 34; *Matter of Edmonds*, 47 App. Div. 229; *Matter of Kirby*, 36 Misc. Rep. 312; *Koehler v. Hughes*, 148 N. Y. 507; *Rosenstein v. Fox*, 150 N. Y. 354; *Randall v. N. Y. El. R. R. Co.*, 149 N. Y. 211; *Matter of Gregory*, 21 N. Y. S. R. 871; *Matter of Sargent*, 42 App. Div. 301.) Sally Maria Peck has no interest, vested or contingent, either in the land devised, or in that directed to be sold, and she is not a necessary party to this action. (*Stokes v. Weston*, 142 N. Y. 433; *Washbon v. Cope*, 144 N. Y. 287; *Nelson v. Russell*, 135 N. Y. 137; *Quackenboss v. Kingsland*, 102 N. Y. 128; *Van Derzee v. Slingerland*, 103 N. Y. 47; *Matter of N. Y., L. & W. R. R. Co.*, 105 N. Y. 89; *DeLafield v. Barlow*, 107 N. Y. 535; *Salisbury v. Slade*, 160 N. Y. 278; *Chamberlain v. Chamberlain*, 43 N. Y. 432; *Hauselt v. Patterson*, 124 N. Y. 349.)

GRAY, J. The judgment, which the plaintiff now has, validates the claim against the testator's estate and authorizes the disposition of the real estate devised by the will, by a sale, for the purpose of satisfying the amount found to be due. In so far as the plaintiff seeks the equitable intervention of the court to compel the exercise by the executor of the power of sale

contained in the will, the action is clearly maintainable; assuming that the debt has been conclusively established. The testator expressly empowered his executor to sell the "Jay Gibbons farm," "for the purpose of paying debts and for the interest of his daughter," in order that, the debts being thus paid, the residue of the proceeds of sale of that and of the other real estate mentioned in the clause might be given to the latter. The power of sale thus given was imperative and imposed a duty on the executor, the performance of which might be compelled in equity for the benefit of the creditors, or the daughter. (2 R. S. 734, sec. 96.) The debts were not made a charge upon the testator's real estate; but a power to sell certain portions of it for their payment was given, the execution of which in nowise depended upon the will of the grantee of the power. Hence, the remedy of the creditor, upon the failure to exercise the power of sale, was by application to a court of equity. (*Matter of Gantert*, 136 N. Y. 106.) The sale of the real estate for the payment of the debts is not, as it is argued, to be effected, solely, through proceedings provided for in the Code of Civil Procedure. Section 2759 provides that a decree directing the disposition of real property, in a case where, under section 2750, the creditor of the decedent has instituted a proceeding for that purpose, can be made only where the property directed to be disposed of is not subject to a valid power of sale for the payment of the debts. (Subdiv. 4.)

The action, therefore, was maintainable, if the claim of the creditor was an enforceable one, and, as to that, the appellant argues that the executor could not, by the acknowledgment of the debt, prevent the Statute of Limitations from running. He argues, in effect, that the principle of the rule, which prevents an executor from reviving a debt against the estate of his testator which is barred by the statute, applies, equally, to his right to keep a debt alive. I perceive no force in such an argument; nor am I aware of any authority in reported cases, which would support it. The demand of the plaintiff was upon an obligation of the testator, subsisting at the time of

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his death and for which his estate was concededly liable. It was the right and it was the duty of the executor to discharge the indebtedness upon the obligation, either from the personal estate, or, if that was insufficient, by the exercise of the power of sale given to him by the will. There is a plain distinction between the right of an executor to revive an indebtedness against his testator's estate, which had been extinguished by law, and his right to acknowledge, and to keep in force, a subsisting obligation, by making payments from time to time upon the principal of the debt, or by way of keeping down the interest. (*McLaren v. McMartin*, 36 N. Y. 88; *Butler v. Johnson*, 111 id. 204.) In the one case he, in effect, creates an indebtedness; while, in the other, he is performing a moral obligation and is executing a duty recognized by law.

It is, further, objected by the appellant that a former adjudication in the Surrogate's Court was a bar to the maintenance of this action. In my opinion, that is not the effect of the surrogate's decree referred to. All that decree effected was, as it states, the dismissal of the creditor's petition. The statement, which it contained, that "the proceeding to compel the executor to account is barred by the statute of limitations," was not a final adjudication upon the validity of the petitioner's claim. It was the conclusion of the surrogate that, by reason of the lapse of time, the executor could not be compelled to account in such a proceeding. Whether the surrogate was correct or not, in that respect, is not material. He, in effect, nonsuited the petitioner, by dismissing his petition, and, in so doing, has complied with certain provisions of the Code of Civil Procedure. By section 1822, it is provided that, where an executor rejects a claim against the estate, "unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor, * * * the claimant must commence an action for the recovery thereof," etc. By section 2722, if a petition is presented to the Surrogate's Court by a creditor, praying for a

decree directing the executor to pay his claim, it is provided that the surrogate must dismiss the petition, "without prejudice to an action or an accounting," where the latter files a written answer, setting forth facts, which show "that it is doubtful whether the petitioner's claim is valid and legal and denying its validity or legality." Obviously, if the proceeding were one, in which the executor was called upon to render his account by a creditor, the validity of whose claim is either expressly denied, or is shown to be doubtful, the result must be the same, as to the surrogate's jurisdiction. I do not think we can say that the filing of a petition by a creditor, and of an answer thereto by the executor denying the validity of a claim, was equivalent to the filing of the written consent required by the statute. The fact that the claim was disputed deprived the surrogate of jurisdiction to determine its validity and to decree its payment. (*Matter of Callahan*, 152 N. Y. 320.)

It is, further, argued that this action cannot be maintained against the devisees individually. The order of the Appellate Division struck out any recovery against the executor, individually, of any deficiency judgment and there was no judgment at all against Mrs. Peck. Whether the judgment is maintainable for the sale of the real estate devised to Edward Gibbons is somewhat doubtful; inasmuch as the averments of the complaint and the proofs do not seem in sufficient compliance with the provisions of the Code with reference to an action against devisees and Mrs. Peck was not brought into the action. (Code, secs. 1843, 1846, 1849, 1851.) But, as the judgment must be reversed and a new trial ordered, for the failure to bring in Mrs. Peck, we will not discuss this question.

The serious feature of this case, and one which requires the reversal of the judgment, is that Mrs. Peck, though made a defendant by name, was never brought into the litigation by a legal service upon her of the summons. The order for the service of the summons upon her was not founded upon the affidavit, which section 439 of the Code requires to be made. Indeed, the respondent conceded, in open court, that there

was no such legal service; but he says that Mrs. Peck has "no interest, vested or contingent, in the land devised, or in that directed to be sold, and that, therefore, she is not a necessary party to the action." This contention seems rather extraordinary, in view of the allegations of the complaint; to the effect, not only, that Mrs. Peck is a devisee under the will and holds as such, but that the payments made by the executor upon the note and the delay by him in the sale of the real estate were with her knowledge and consent, and in view of the findings, which recited the facts of a personal service upon her of the summons and complaint and of her knowledge of, and consent to, the executor's acts. If we might disregard these matters, as not necessarily conclusive upon the respondent, we, still, are confronted with the fact that Mrs. Peck did have an interest in the estate of the testator and in the enforcement of the power of sale contained in the will, which made her a necessary party to the action; without whose presence the court would acquire no jurisdiction to render any decree, which would affect her legal, or equitable, interests. Under the third clause, by which the "Huyck farm" was given to the testator's son, "unless he should die without legal issue," in which case it was to go to his daughter, Mrs. Peck, she took no interest; because the son survived the testator and the estate had vested in him. Under the fourth clause, however, which empowered the executor to sell the "Jay Gibbons farm" and the residence, for the purpose of paying debts and applying the surplus to the testator's daughter, her interests are very clear and substantial. As one of the two heirs at law of the testator, she had an interest in such real estate; which was subject, of course, to the exercise of the power of sale. Having such, her interest in any legal proceeding, wherein it was sought to compel a sale for the purpose of paying claims against the testator's estate, was very substantial. She was very much concerned, by reason of her legal and equitable interests, that such claims should be satisfactorily and legally established, as obligations of the testator which were actually subsisting against his estate. It

cannot, truthfully, be said that Mrs. Peck had no interest, which could be injuriously affected by the result of this litigation, and, therefore, within those rules which govern the judgment of a court of equity, she should have been brought into the litigation. Courts of equity observe a fundamental principle concerning parties, that all persons, who are interested, directly or indirectly, in the subject-matter and in the relief to be granted by decree, should be brought into the suit. When it appears that their rights might be affected thereby, and they are capable of being made parties, a court of equity should not proceed to decide the case without them. (Story's Equity Jurisprudence, sec. 1526 ; Pomeroy's Equity Jurisprudence, sec. 114.)

In the absence of Mrs. Peck as a party to the action, the court did not obtain jurisdiction to render a judgment for the sale of the testator's real estate.

It was, also, quite unnecessary to the judgment to direct a sale of the real estate through a referee. I am not aware of any authority in the law for such procedure. It not having been charged, or found, that the executor was unfit, or without capacity to execute the power of sale, the judgment of the court should have directed him to effect the sale.

For the reasons I have given, I advise that the judgment appealed from should be reversed and that a new trial should be ordered, with costs to abide the event.

HAIGHT, VANN, CULLEN and WERNER, JJ., concur ; BARTLETT, J., votes for reversal on the ground that Mrs. Peck had such an interest in the "Jay Gibbons farm" as rendered her a necessary party defendant ; PARKER, Ch. J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THE THAMES AND MERSEY MARINE INSURANCE COMPANY,
LIMITED, Appellant.

TAX—FOREIGN INSURANCE CORPORATION—FRANCHISE TAX UPON FIRE AND MARINE INSURANCE CORPORATION—EFFECT OF CHAPTER 118 OF LAWS OF 1901. A foreign marine insurance company doing business in this state must pay the annual tax of five-tenths of one per centum on the gross amount of premiums received for business done within this state during each calendar year, imposed by chapter 118 of the Laws of 1901, amending section 187 of the Tax Law (L. 1896, ch. 908, § 187), "in addition to all other fees, licenses or taxes imposed by this or any other law," and is no longer entitled to have deducted therefrom all other taxes paid by the company, under the provisions of the Insurance Law (L. 1892, ch. 690, as amd. by L. 1898, ch. 725), providing that the superintendent of insurance in collecting the tax of two per centum thereby imposed upon the amount of all premiums upon insurance against marine risks received by any foreign insurance company during the preceding calendar year, shall deduct therefrom all other taxes paid by such corporation under the laws of this state; since it is apparent from the former statute that it was the purpose of the legislature to increase the franchise tax imposed upon foreign insurance corporations to one per centum per annum, which it did, in the case of all of such corporations except fire and marine insurance corporations, by increasing the tax from five-tenths of one per centum to one per centum, but in the case of the latter corporations it effected this purpose by providing that the tax of five-tenths of one per centum per annum imposed upon such corporations should be *in addition* to the taxes authorized by other statutes, and, therefore, the provision of the Insurance Law providing for a deduction of such tax must be deemed to have been repealed by implication by the statute in question.

People v. Thames & Mersey Marine Ins. Co., 85 App. Div. 623, affirmed.

(Argued November 20, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered August 10, 1903, which affirmed a judgment in favor of plaintiff entered upon a decision of the court at Special Term sustaining a demurrer to the answer.

The nature of the action and the facts, so far as material, are stated in the opinion.

James F. Tracey for appellant. The Franchise Tax Law of 1901 does not repeal the clause directing the manner of

ascertaining the gross premium tax on foreign marine insurance companies. (*Wood v. Bd. of Suprs.*, 136 N. Y. 403; *Matter of Curser*, 89 N. Y. 401; Cooley on Taxn. [2d ed.] 294; Black on Interp. Stat. 117, § 53; *Hoey v. Gilroy*, 129 N. Y. 132; *Van Denburgh v. Vil. of Greenbush*, 66 N. Y. 1; *Casterton v. Town of Vienna*, 163 N. Y. 368; *People v. Jaehne*, 103 N. Y. 182.) The construction of the controverted clause in the Franchise Tax Act of 1901 assumed by the respondent is not necessary, nor on analysis is it the preferable one. (*Saunders v. Evans*, 8 H. L. Cas. 721; Broom's Leg. Maxims, *627.)

John Cunneen, Attorney-General, and *George F. Slocum* for respondent. An analysis of the amendment of 1901 shows the clear legislative intent to increase the revenues by increasing the tax upon insurance corporations, and as incidental to that purpose to do away with all rebates other than those expressly mentioned in the act. (*Hackmann v. Pinkney*, 81 N. Y. 211; *People v. Jaehne*, 103 N. Y. 182, 195.) While it is true that repeals by implication are not favored, yet where the provisions of two statutes are absolutely irreconcilable the earlier must give way. (*Lyddy v. Long Island City*, 104 N. Y. 218; *Stack v. City of Brooklyn*, 150 N. Y. 335; Potter's Dwaris on Stat. 155.)

HAIGHT, J. This action was brought to recover the amount of the annual tax payable to the superintendent of insurance by the defendant, a foreign marine insurance company, pursuant to section thirty-four of the Insurance Law, amounting to the sum of \$8,334.24.

The defendant, in its answer, alleged that it had been assessed a franchise tax, pursuant to section one hundred and eighty-seven of the Tax Law, of \$1,191.72, which it had paid to the comptroller, and demanded that this amount should be deducted from the amount claimed by the superintendent of insurance. The defendant further alleged that it had tendered payment of the balance due the superintendent of insurance after the deduction of the franchise tax as aforesaid.

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The demurrer interposed was to the effect that the partial defense alleged in the answer was insufficient in law. The demurrer was sustained and final judgment has been entered in favor of the state. The statute under which this controversy arises, so far as is material to the question involved, is as follows :

“ The agent of every corporation, association or individual not incorporated by the laws of this state to effect insurances against marine risks, shall annually, on or before the first day of February, pay to the superintendent of insurance a tax of two per centum upon the amount of all premiums upon insurances against marine risks which have been received by such agent or any person for him or have been agreed to be paid for any such insurance effected or agreed to be effected or procured by him, within this state, for the year ending the thirty-first day of December preceding ; *but in collecting such tax from a foreign marine insurance corporation, the superintendent of insurance shall deduct therefrom all other taxes paid by such corporation under the laws of this state.*” (Insurance Law, § 34, being chapter 690 of the Laws of 1892, as amended by chapter 725 of the Laws of 1893.) By chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, there was imposed a franchise tax on every corporation or association organized under the laws of other states or countries doing business in this state, and these provisions were subsequently incorporated into chapter 908 of the Laws of 1896, section 187. Under these provisions the defendant had the right to have the amount of the franchise tax assessed to and paid by it deducted from the amount which was payable to the superintendent of insurance, but, in the year 1901, by chapter 118, the provisions of section 187 of the Tax Law were amended, and, so far as material, provide as follows : “ An annual state tax for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within this state equal to one per centum on the gross amount of premiums received during the preceding calendar year for business done in this state,

whether such premiums were in the form of money, notes, credits, or any other substitute for money, shall be paid annually into the treasury of the state, on or before the first day of June, by the following corporations:

"1. Every domestic insurance corporation, incorporated, organized or formed under, by, or pursuant to a general or special law;

"2. Every insurance corporation, incorporated, organized or formed under, by, or pursuant to the laws of any other state of the United States, and doing business in this state, except a corporation doing a fire insurance business or a marine insurance business;

"3. Every insurance corporation, incorporated, organized or formed under, by, or pursuant to the laws of any state without the United States, or of any foreign country, except such a corporation doing a life, health or casualty insurance business, and doing business in this state; but the tax on gross premiums of a corporation so incorporated, organized or formed and doing a fire or marine insurance business within the state shall be equal to five-tenths of one per centum.

* * * *The taxes imposed by this section shall be in addition to all other fees, licenses or taxes imposed by this or any other law."*

The provisions of this amendment increased the franchise tax as to domestic and foreign insurance corporations, with the exceptions specified in the act, but as to foreign corporations organized for fire and marine insurance their franchise tax remained unchanged at five-tenths of one per centum. It is thus apparent that the legislative purpose was to effect a general increase in the franchise tax upon insurance corporations which had theretofore been taxable, and this was accomplished by increasing the tax from five-tenths of one per centum to one per centum. True, foreign corporations doing a marine insurance business did not, in terms, have their taxes increased, but instead thereof we have the provision that the tax imposed by this section shall be in addition to those imposed by any other law. Under the law as it had thereto-

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fore existed the defendant corporation, as we have seen, was assessed a franchise tax of five-tenths of one per centum, which it deducted from the two per centum tax payable, under the Insurance Law, to the superintendent of insurance. It, therefore, was required to pay a tax of two per centum upon the amount of all its premiums upon insurance collected or agreed to be paid in this state. By making the five-tenths of one per centum *in addition* to the tax authorized by other statutes, the effect was to increase the defendant's tax in the amount of one-half of one per centum, which is the amount that other corporations, domestic and foreign, have had their taxes increased by the provisions of this act. While we recognize the correctness of the rule invoked by the appellant with reference to the interpretation of statutes, and that repeals by implication are not favored in the law, yet the legislative intent in this case is so clearly apparent that we think the provision of the Insurance Law providing for a deduction of such taxes must be deemed to have been repealed by implication by the latter statute, and that the franchise tax imposed upon the defendant was intended to be "in addition to all other fees, licenses or taxes imposed by this or any other law."

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, VANN, CULLEN and WERNER, JJ., concur.

Judgment affirmed. _____

AGNES G. TRUNKEY, Respondent, v. JANE B. VAN SANT et al.; Individually and as Executors of SARAH M. BERLIN, Deceased, Appellants, and EDWIN L. GARVIN, et al., Respondents.

WILL—CONSTRUCTION OF CLAUSE APPOINTING TRUSTEES "RESIDUARY LEGATEES"—RESIDUARY ESTATE RESULTING FROM INVALID TRUST PASSES TO SUCH RESIDUARY LEGATEES. Where a testatrix gave and devised all of her property to three persons, named in her will, "to have and to hold the same to themselves, their heirs and assigns forever, upon the uses and trusts following: To pay all my debts and pay such proportions of said estate to such persons as they may ascertain and a majority

shall agree to have been my expressed wish, or as I may hereafter formally designate, and I hereby nominate and constitute and appoint my said trustees residuary legatees of my estate," the use of the words "said trustees" in the residuary clause is the equivalent of specifying by name the residuary legatees who had already been designated by their several names; and, the second trust being void for indefiniteness, the residue of the estate, after the payment of debts as directed by the first trust, is a definite and ascertainable quantity, the determination of which is not dependent upon the validity or invalidity of the second trust, and passes to the residuary legatees; since it is apparent from the language used by testatrix that she intended to give her estate, after the execution of the two trusts, to the three persons named as residuary legatees, their heirs and assigns forever, so that the will stands, with the invalid trust eliminated, precisely as though the testatrix had said, I give to these three persons all my property upon the trust to pay my debts and the residue to them, their heirs and assigns forever.

Trunkey v. Van Sant, 88 App. Div. 272, reversed.

(Argued November 19, 1903; decided December 1, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 4, 1903, reversing a judgment in favor of appellants herein entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Franklin Pierce and *William Arrowsmith* for appellants. The words "to have and to hold the same to themselves, their heirs and assigns forever," even though followed by the words "upon the uses and trusts," was a gift of the entire estate to the three persons named. (3 Redf. on Wills [4th ed.], 599; *Trask v. Sturgis*, 170 N. Y. 491; *Lewin on Trusts* [10th ed.], 161; *Perry on Trusts*, § 158; *Dawson v. Clarke*, 15 Ves. 409; 18 Ves. 253; *Wood v. Cox*, 2 Myl. & Cr. 684; *Fenton v. Hankins*, 9 Wkly. Rep. 300; *Clay v. Wood*, 153 N. Y. 134; *Morton v. Woodbury*, 153 N. Y. 243; *Howard v. Carrusi*, 109 U. S. 375; *Foose v. Whitmore*, 82 N. Y. 405; *Clarke v. Leupp*, 88 N. Y. 228; *Campbell v. Beumont*, 91 N. Y. 464.) The words "I hereby nominate, constitute and appoint my said trustees residuary legatees of my estate" are fit and apt

words to vest in them absolutely the whole residuary estate. (*Spark v. Purnell*, Hobart, 75; *Parker v. Nickson*, 1 De G., J. & S. 177; 2 Redf. on Wills [2d ed.], 316; *Laing v. Barber*, 119 Mass. 523; *Hughes v. Pritchard*, L. R. [16 Ch. Div.] 24; *Jackson v. Kelly*, 2 Ves. Sr. 285; *Morton v. Woodbury*, 153 N.Y. 243; *Wyman v. Woodbury*, 86 Hun, 282.) The holding of the Appellate Division that the trustees were to take the balance of the property, not as individuals, but as trustees, for the purpose of applying it to or satisfying another trust which is not disclosed and cannot be ascertained, has no foundation. The words "said trustees" are words of description and clearly mean Jane B. Van Sant, Julia D. Lawrence and Louis Faugeres Bishop. (*Roe v. Vingut*, 117 N. Y. 204; *Dawson v. Clarke*, 18 Ves. 253; *Matter of Logan*, 131 N. Y. 460; *Gelston v. Shields*, 16 Hun, 143; *Walter v. Ham*, 68 App. Div. 381; *Forster v. Winfield*, 142 N. Y. 327; *Marks v. Halligan*, 61 App. Div. 179; *Matter of Russell*, 168 N. Y. 175; *N. Y. L. Ins. Co. v. Viele*, 161 N. Y. 11; *Hull v. Pearson*, 36 App. Div. 228.) The words "I hereby nominate and constitute and appoint my said trustees residuary legatees of my estate" is a general residuary clause making the appellants general residuary legatees, and vest in the appellants as against the respondents any void legacies, if any such can be regarded as existing, and the whole residuary estate of every name and nature. (Schouler on Wills [2d ed.], § 490; *Vernon v. Vernon*, 53 N. Y. 352; *Floyd v. Carow*, 88 N. Y. 560; *Wager v. Wager*, 96 N. Y. 164; *Henderson v. Henderson*, 113 N. Y. 16; *Riker v. Cornwell*, 113 N. Y. 115; *Lamb v. Lamb*, 131 N. Y. 227; *Schult v. Moll*, 132 N. Y. 122; *Johnson v. Brasington*, 156 N. Y. 181; *Meeks v. Meeks*, 161 N. Y. 66; *Lyman v. Lyman*, 22 Hun, 263.)

Richard B. Aldcroft, Jr., and *Edwin Louis Garvin* for plaintiff, respondent. No valid trust or power is created except to pay the debts. (*Tilden v. Green*, 130 N. Y. 29; *Levy v. Levy*, 33 N. Y. 107; *Read v. Williams*, 125 N. Y. 560; *Prichard v. Thompson*, 95 N. Y. 76.) The expressed

intent of the testatrix is that her whole estate shall go to the trustees for the purposes of the valid and invalid trusts. (*Tilden v. Green*, 130 N. Y. 29; *Van Ostrand v. Moore*, 52 N. Y. 18; *Fairchild v. Edson*, 77 Hun, 298; *Clements v. Babcock*, 26 Misc. Rep. 90; *Edson v. Barto*, 10 App. Div. 104; 154 N. Y. 199; *Wood v. Mitcham*, 92 N. Y. 379.) The so-called residuary clause does not give the executors a beneficial interest in the estate. (2 Jarman on Wills [6th ed.], 657; *Trethewy v. Helyar*, L. R. [4 Ch. Div.] 53; *Stackpoole v. Howell*, 14 Ves. 417; *Pratt v. Sladden*, 14 Ves. 193; *Gibbs v. Rumaly*, 2 V. & B. 294; *Seley v. Wood*, 10 Ves. 71; *Abbott v. Abbott*, 6 Ves. 343; *Forster v. Winfield*, 142 N. Y. 327; *Morton v. Woodbury*, 153 N. Y. 250.) The residue being uncertain and indeterminable, the so-called residuary clause is invalid for that reason also. (*Beekman v. Bonsor*, 23 N. Y. 299; *Kerr v. Dougherty*, 79 N. Y. 328; *Booth v. Baptist Church*, 126 N. Y. 245.) The words "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following" are words importing a trust estate only. (*Southouse v. Bate*, 2 V. & B. 396; *King v. Dennison*, 1 V. & B. 260.)

Samuel S. Mehard and *Charles W. McCandless* for defendants, respondents. The appellants' contention that the words "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following," etc., was a gift of the entire estate to the appellants, is founded upon a false premise. (*Dawson v. Clark*, 15 Ves. 409; *Bradstreet v. Clark*, 12 Wend. 602; *Griffen v. Ford*, 14 N. Y. Super. Ct. 123; *Trustees v. Kellogg*, 16 N. Y. 83; *Van Vechten v. Keator*, 63 N. Y. 52; *Shephard v. Gassner*, 41 Hun, 326; *Matter of Logan*, 131 N. Y. 456.) The true interpretation of the testatrix's intent, as expressed, is that she intended the trustees after paying proportions, to devote the residue to another trust, and the trust of the residue fails for uncertainty. (*Read v. Williams*, 125 N. Y. 560, 568; *Prichard v. Thompson*, 95 N. Y. 76; *People v. Powers*, 147 N. Y.

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104; *Levy v. Levy*, 33 N. Y. 97; *Tilden v. Green*, 130 N. Y. 29; *Holland v. Alcock*, 108 N. Y. 312; *Nichols v. Allen*, 130 Mass. 211; *Briggs v. Penny*, 3 MacN. & G. 149; *Schmucker v. Reel*, 61 Mo. 595.) Even if it be admitted that the testatrix intended that the trustees after paying proportions should take the residue as individuals, such an interpretation makes the residuary clause invalid. (*Beekman v. Bonsor*, 23 N. Y. 299; *Limbrey v. Gurr*, 6 Maddox, 151; *Burnett v. Burnett*, 30 N. J. Eq. 595; *Skrymsher v. Northcote*, 1 Swan. 570; *Green v. Pertweel*, 5 Hare. 249; *Loyd v. Loyd*, 4 Beav. 231; *Floyd v. Baker*, 1 Paige, 480; *Howland v. Clendin*, 134 N. Y. 305; Theobald on Wills, 188; Hawkins on Wills, 43; Wms. on Ex. 1461; 1 Jarman on Wills, 613, 719; *Kerr v. Dougherty*, 79 N. Y. 346.) The interpretation that the part to pay proportions being void, the trust ceases upon the payment of the debts, and the trustees take the entire estate free of the trust, is untenable. (*Roosevelt v. Thul*, 1 Johns. Ch. 220; *Home v. Van Schaick*, 3 N. Y. 538; *Law v. Lord Stanhope*, 6 T. R. 352; *Phillips v. Garth*, 3 Bro. 68; *Buck v. Norton*, Bos. & Pull. 57; *Smith v. Butcher*, 10 C. B. 113; *Matter of Trenken*, 131 N. Y. 391; *Goebel v. Wolf*, 113 N. Y. 405; 2 Jarman on Wills, 842; *Morrison v. Tinley*, 143 Penn. St. 540; *Heilman v. Heilman*, 129 Ind. 59.)

WERNER, J. This is a contest between heirs at law and legatees over the construction of a will. On the 28th day of May, 1902, Sarah M. Berlin died, leaving a last will dated May 19th, 1902, in the following form: "Being of feeble health, but of sound mind, at the time of making and publishing this, my last Will and Testament, I give and devise all my estate, real and personal, whereof I may die seized or possessed, to Mrs. Jane B. Van Sant, of Philadelphia; Mrs. Julia D. Lawrence, of New York City, and Louis Faugeres Bishop, of the same place, to have and to hold the same to themselves, their heirs and assigns forever, upon the uses and trust following: To pay all my debts and pay such propor-

tions of said estate to such persons as they may ascertain and a majority shall agree to have been my expressed wish, or as I may hereafter formally designate, and I hereby nominate and constitute and appoint my said trustees residuary legatees of my estate, and I hereby nominate, constitute and appoint said trustees Mrs. Jane B. Van Sant, Mrs. Julia D. Lawrence and Louis Faugeres Bishop, Executors of my last Will and Testament."

The only surviving heirs at law and next of kin of the testatrix are the plaintiff and the defendants Garvin, who were her cousins. The defendant Van Sant was a stepdaughter of the testatrix; the defendant Lawrence had been her close friend for many years and the defendant Bishop had been her physician and was a distant relative. It is conceded that the trust to pay debts is valid; that the direction to pay and distribute such proportions of the estate to such persons as a majority of the trustees should ascertain and agree to have been the expressed wish of the testatrix is void for indefiniteness, and the issue is, therefore, narrowed to the single question whether the trustees named in the will take as legatees under the residuary clause, or whether the residuum after the payment of the debts passes to the next of kin.

The Supreme Court at Special Term held that after the cessation of the trust for the payment of debts the estate passed to the residuary legatees. At the Appellate Division a different conclusion was reached, and the next of kin were held to be entitled to the residue of the estate, upon the theory that the second and third provisions of the will are inseparable and that the conceded invalidity of the one inevitably establishes the invalidity of the other.

The cases of *Beekman v. Bonsor* (23 N. Y. 299) and *Kerr v. Dougherty* (79 N. Y. 328) are cited in support of this conclusion, but we think neither of them is a controlling authority in the case at bar. In the *Beekman* case the testator's will, after having disposed of various specific legacies, contained a provision that out of the residue his executors should establish a medical dispensary, if they should have sufficient

funds, but there was no specification of the amount to be expended for that purpose. This was followed by a direction that if there should be any overplus the executors might, within fifteen years, give it to any other charitable society or societies for the relief of the comfortless and indigent whom they might select. In discussing these two provisions of the will the learned judge who wrote for this court said: "Now we have seen that the sum which the testator intended to give for a dispensary was wholly uncertain in amount and that the bequest was void on that and other grounds. As that portion of the residuum must go to the next of kin as undisposed of, the final gift of the remainder involves precisely the same uncertainty, and is void for the same reason. In order to ascertain the amount of this gift (the final residue), the sum intended to be previously appropriated out of the whole residue must first be known. But, as this cannot be known, the ultimate bequest falls to the ground also."

This argument, as applied to the facts of that case, was strictly logical, because the court was dealing with the residue of a residue that was indefinite and unascertainable; but the decision of the court was not based on that sole ground, for in a following paragraph of the opinion it was held that the final bequest was also void, because it was so indefinite that its amount and purpose were incapable of being ascertained.

In the *Kerr Case* (*supra*) one of the questions involved also arose over the residue of a residue. There the testator made certain specific bequests, some of which were to various religious, educational and charitable institutions. To the wife of the testator was bequeathed during her life the net income of the estate after the payment of the specific legacies, and after her death the principal left of the estate was bequeathed to some of the institutions named in the specific bequests. The specific bequests to religious, educational and charitable institutions were declared void, and thus the question arose whether the amounts of the several void bequests passed into the residuum of the estate, or were to be distributed as in cases of intestacy. This court held that the sums attempted to be

bequeathed by the void legacies went to the widow and next of kin as undisposed of by the will, because the wife's life estate was expressly limited to that portion of the estate remaining after the payment of the specific legacies, and the residuary bequests, which were not to take effect until the wife's death, were undisposed of during the period covered by her life, and after her death were good for only one-half their amount under the provisions of ch. 360, L. 1860. In that case the court was dealing with two residues, one of which was limited upon the other, and neither of which included the amounts attempted to be bequeathed by the void legacies. The residue, of which the testator's wife was to have the life use, was expressly limited to that portion of the estate remaining after the payment of the specific legacies. The final residuary legacies were not to take effect until the wife's death and, like the latter's life estate, related to the residue of the estate which should remain after the payment of the specific legacies. The failure of the specific legacies, therefore, created a second residue for which no provision was made in the will, and, hence, it devolved as in cases of intestacy.

In the case at bar we have a radically different condition than that which existed in either of the two cases above referred to. Here the conceded invalidity of the second clause of the will reduces the residuum to a definite and ascertainable quantity, unless, as held below, all the provisions of the will are so inseparable that each is dependent upon the other. As we read the will there is no such connection between its several parts as to make the invalidity of one determinative of all. The first, which contains the direction to pay debts, is concededly good. The second, which directs the payment of indefinite amounts to undesignated beneficiaries, is clearly invalid. The validity of the third, which nominates as residuary legatees the designated trustees of the testatrix, depends upon the intention of the latter, which is to be derived from the context of the whole will. It is to be noted that, although the estate is given to the three persons named in the will upon the trusts therein named, it is also given to them, their heirs

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and assigns forever. While these latter words must undoubtedly yield to a clear, positive and valid creation of a trust or of a limited estate, it is equally true that they will be given great weight and cogency when the language relied upon to import a trust or a limited estate is uncertain or ambiguous. (*Clay v. Wood*, 153 N. Y. 134.)

The only two trusts specified in the will are (1) the trust to pay debts, and (2) the trust to "pay such proportions of my said estate to such persons as they (trustees) may ascertain and a majority shall agree to have been my expressed wish or as I may hereafter formally designate." Immediately following the declarations of these two trusts the testatrix goes on to say, "and I hereby nominate, constitute and appoint my said trustees residuary legatees of my estate." In *Morton v. Woodbury* (153 N. Y. 251) the language of the testatrix was "I hereby appoint E. C. W. my legatee and give to her all not before specified in this," and it was held to be sufficient to pass the residue of the estate as effectually as though more formal words had been employed. The court below seemed to think the use of the words "my said trustees" in the residuary clause of the will indicated an intention to create an undisclosed and nameless third trust, to satisfy which the residuary legacy was created. We think the use of the words "said trustees" in the residuary clause are the equivalent of specifying by name the residuary legatees who had already been designated by their several names in the opening clause of the will, and that it refers to them as trustees of the previously declared trusts, rather than as trustees of some imaginary trust which is to be added to the end of the will by judicial construction.

In the light of these observations upon the unscientific phraseology of the will, let us look for the intention of the testatrix which, in the language of Chief Justice MARSHALL, is the "polar star" of testamentary construction. The opening and the closing words of the will serve to clearly indicate an intention to bequeath substantially the whole of the estate to Jane B. Van Sant, Julia D. Lawrence and Louis F. Bishop.

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This, as we have said, is shown by the use of the words "Their heirs and assigns forever" before the words "upon the uses and trust following," and is emphasized by the fact that the only trusts thereafter named are to pay debts, and to distribute unspecified portions of the estate to unnamed persons. If the testatrix had intended that after payment of her debts the second trust should absorb all, or the greater portion, of her estate, she would, presumably, have employed more specific directions concerning it, or at least have expressed some limitation as to the residuum. In the absence of these things the probabilities strongly support the contention of the residuary legatees, that the real and substantial part of this considerable estate was intended to go to them.

But the result does not depend upon this last conclusion. If the second trust were valid, the residue of the estate, whether great or small, would go to the residuary legatees. The second trust was not to be carved out of a residue as in the *Beekman* and *Kerr* cases, above cited. Here there was to be no residue until the two trusts had been fulfilled. The residue then remaining would have been definite and ascertainable; not the unascertainable residue of a residue, but a sum capable of exact computation. Has the failure of the second trust complicated conditions? This question carries its own answer. As the will now stands, it is precisely as though the testatrix had said I give to these three persons all my property upon the trust to pay my debts and the residue to them, their heirs and assigns forever. The diversity in wills is as great as the difference in individuals. Authorities are, therefore, seldom of value or assistance except as they treat of similar cases or bear upon the general rules of construction.

Without further discussion of the cases cited in the briefs of counsel we conclude that the order of the Appellate Division must be reversed, and the judgment entered upon the decision of the Special Term must be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, VANN and CULLEN, JJ., concur.

Order reversed, etc.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

DE WITT C. BECKER et al., as Surviving Partners of the Firm
of DAVID BRADT, BECKER & Co., Appellants, v. JOHN
KRANK et al., Respondents.

Becker v. Krank, 75 App. Div. 191, affirmed.

(Argued June 12, 1908; decided October 6, 1908.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the third judicial department, entered July
14, 1902, upon an order reversing a judgment in favor of
plaintiffs entered upon a verdict directed by the court and
granting a new trial.

John A. Delehanty for appellants.

R. J. Cooper and *Frank Cooper* for respondents.

Judgment affirmed and judgment absolute ordered for
defendants on the stipulation, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

CHARLES D. MARSHALL, as Trustee of Certain Trusts Created
by HEMAN B. POTTER, Deceased, Respondent, v. THE CITY
OF BUFFALO, Appellant.

Marshall v. City of Buffalo, 63 App. Div. 601, affirmed.

(Argued June 22, 1903; decided October 6, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
August 14, 1901, sustaining plaintiff's exceptions ordered to

be heard in the first instance by the Appellate Division and granting a motion for a new trial.

Edward L. Jung and *Charles L. Feldman* for appellant.

Adolph Rebadow for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

CARL STANDTKE, Appellant, *v.* THE SWITS CONDÉ COMPANY,
Respondent.

Standtke v. The Swits Condé Company, 64 App. Div. 625, affirmed.
(Argued June 22, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 22, 1901, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

D. P. Morehouse and *L. C. Rowe* for appellant.

Elisha B. Powell for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

CENTRAL TRUST COMPANY OF NEW YORK, Respondent, *v.*
NEW YORK AND WESTCHESTER WATER COMPANY et al.,
Appellants.

Central Trust Co. of N. Y. v. N. Y. & Westchester Water Co., 68 App. Div. 640, affirmed.
(Argued June 22, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

January 29, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

William L. Snyder, Arthur J. Baldwin, Leonard D. Baldwin and Henry L. Rupert for appellants.

Arthur H. Van Brunt for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, CH. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent: MARTIN, J.

In the Matter of the Estate of ELLIS H. ELIAS, Deceased.
WILLIAM M. ELIAS et al., Appellants; MAGGIE LEWIS et al.,
Respondents.

Matter of Elias, 60 App. Div. 630, appeal dismissed.
(Argued June 23, 1903; decided October 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1901, which affirmed an order of the New York County Surrogate's Court denying a motion to vacate a sale by the public administrator of New York county of certain assets of the estate of Ellis H. Elias, deceased.

Franklin Bien for appellants.

Frederick B. Woodruff, William N. Cohen, Porte V. Ransom and Frank W. Arnold for respondents.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, CH. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent: MARTIN, J.

A. B. FARQUHAR COMPANY, LIMITED, Respondent, v. MONROE
TRUESDELL, Appellant.

A. B. Farquhar Co., Limited, v. Truesdell, 66 App. Div. 616, affirmed.
(Argued June 23, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

November 19, 1901, affirming a final judgment in favor of plaintiff, entered upon failure to comply with the terms of an interlocutory judgment entered upon a decision of the court at a Trial Term, without a jury, overruling a demurrer to the complaint.

Nelson Smith and *Jesse W. Olney* for appellant.

F. H. Osborn for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, VANN and WERNER, JJ. Not voting: CULLEN, J. Absent: MARTIN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES F. FILKIN, Appellant.

People v. Filkin, 83 App. Div. 589, affirmed.

(Argued June 23, 1903; decided October 6, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, made May 5, 1903, which affirmed a judgment of the Cayuga County Court, rendered upon a verdict convicting the defendant of the crime of forgery in the first degree.

John D. Teller for appellant.

Harry T. Dayton, District Attorney (*Albert H. Clark* of counsel), for respondent.

Judgment of conviction affirmed on opinion of HISCOCK, J., below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent: MARTIN, J.

CHARLES STRUCKS, Respondent, v. ANNA CORNING, Appellant.

Strucks v. Corning, 68 App. Div. 650, affirmed.

(Submitted June 23, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

January 29, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John Van Voorhis and *Browne & Poole* for appellant.

George D. Reed for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., O'BRIEN, BARTLETT VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

GEORGE L. VENNER, Appellant, *v.* FARMERS' LOAN AND TRUST COMPANY, Respondent.

Venner v. Farmers' Loan & Trust Co., 54 App. Div. 271, affirmed.
(Argued June 23, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 28, 1900, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

George H. Yeaman for appellant.

David McClure for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

MARY SHELDERBERG, Appellant, *v.* THE VILLAGE OF TONAWANDA, Respondent.

Shelderberg v. Village of Tonawanda, 70 App. Div. 623, affirmed.
(Argued June 24, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

April 18, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial.

Norman D. Fish for appellant.

W. B. Simson for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

ELTON J. ROSS, Respondent, *v.* JOHN KING et al., as Receivers of the NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellants.

Ross v. King, 66 App. Div. 617, affirmed.

(Argued June 24, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 12, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Henry Bacon and *Joseph Merritt* for appellants.

Frank S. Anderson and *John F. Anderson* for respondent.

Judgment affirmed, with costs, on authority of *Baer v. McCullough* (176 N. Y. 97).

Concur : PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

EDWARD S. WALSH, Respondent, *v.* GEORGE W. HYATT et al., Appellants.

Walsh v. Hyatt, 74 App. Div. 20, affirmed.

(Argued June 24, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

June 10, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Leo J. Kersburg and *Herbert R. Limburger* for appellants.

James M. Hunt for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Absent : MARTIN, J.

E. CLIFFORD POTTER, Respondent, *v.* CAROLINE M. BOYCE, Appellant.

Potter v. Boyce, 73 App. Div. 383, affirmed.

(Argued June 24, 1903; decided October 6, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 11, 1902, upon an order reversing a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term and directing judgment for plaintiff.

Henry Thompson for appellant.

Marcus T. Hun and *David B. Ogden* for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch., J., O'BRIEN, BARTLETT, VANN and WERNER, JJ. Absent : MARTIN, J. Not voting : CULLEN, J.

ELIZA J. ARKENBURGH, as Executrix of ROBERT T. ARKENBURGH, Deceased, Appellant, *v.* ROBERT F. LITTLE, Respondent, Impleaded with Others.

Arkenburgh v. Little, 49 App. Div. 636, affirmed.

(Argued May 1, 1903; decided October 13, 1903.)

APPEAL from a judgment, entered June 20, 1902, upon an order of the Appellate Division of the Supreme Court in the second judicial department, affirming an interlocutory judg-

ment overruling a demurrer to a defense in the answer entered upon a decision of the court at a Trial Term without a jury.

Charles Edward Souther for appellant.

Frank W. Arnold for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, VANN, CULLEN and WEENER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE STANDARD WATER METER COMPANY, Appellant, v. ROBERT GRIER MONROE, as Commissioner of Water Supply, Gas and Electricity of the City of New York, Respondent.

People ex rel. Standard W. M. Co. v. Monroe, 84 App. Div. 241, appeal dismissed.

(Argued October 9, 1903; decided October 13, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 10, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus.

George E. Waldo for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Arthur Sweeny*, of counsel), for respondent.

Appeal dismissed, with costs; no opinion.

CONCUR: O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WEENER, JJ. Absent: PARKER, Ch. J.

ANN GLENNON, as Administratrix of the Estate of RICHARD GLENNON, Deceased, Appellant, v. ERIE RAILROAD COMPANY, Respondent.

Glennon v. Erie R. R. Co., 86 App. Div. 397, appeal withdrawn.

(Argued October 5, 1903; decided October 13, 1903.)

MOTION to withdraw an appeal from a judgment of the Appellate Division of the Supreme Court in the second

judicial department, entered August 5, 1903, which affirmed a judgment of the court at a Trial Term dismissing the complaint after the rendition by the jury of a verdict in favor of plaintiff and an order denying a motion for a new trial.

The motion was made upon the ground that the appeal was not properly taken.

Robert H. Barnett for motion.

Albert Hessberg opposed.

Motion granted upon payment of costs.

LEON T. WALTER, Appellant, v. HENRY TOMKINS et al.,
Respondents, Impleaded with Another.

Walter v. Tomkins, 71 App. Div. 21, appeal dismissed.

(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 22, 1902, affirming a judgment in favor of defendants entered upon a decision of the court at Special Term sustaining a demurrer to the complaint.

The motion was made upon the grounds that the undertaking required to perfect the appeal had not been filed and the record on appeal had not been served upon the respondents.

John S. Montgomery for motion.

Samuel Fruchthandler opposed.

Motion granted unless appellant within ten days after service of order files a proper undertaking and pays twenty-five dollars costs.

MANHATTAN FIRE INSURANCE COMPANY et al., Appellants, v.
JOSEPH FOX et al., Respondents.

Manhattan Fire Ins. Co. v. Fox, 74 App. Div. 271, appeal dismissed.

(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial

department, entered July 23, 1902, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The motion was made upon the ground that the undertaking required to perfect the appeal had not been filed.

William H. Blain for motion.

George M. Fannin opposed.

Motion granted and appeal dismissed, with costs, unless within ten days after service of copy of order the appellants perfect an appeal by filing a proper undertaking and pay ten dollars costs.

In the Matter of the Application of the **GEORGE B. WRAY DRUG COMPANY** for a Voluntary Dissolution. (No. 1.)

BENJAMIN S. COMSTOCK et al., Appellants; **HARRY R. HICKS**, as Receiver, etc., Respondent.

Reported below, 82 App. Div. 645.

(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1903, which affirmed an order of Special Term denying a motion to set aside a final order dissolving the George B. Wray Drug Company.

The motion was made upon the grounds that the order appealed from was not a final order in a special proceeding; that permission to appeal therefrom had not been granted nor had the Appellate Division certified that any question was involved which ought to be reviewed by the Court of Appeals.

Ralph E. Prime, Jr., for motion.

Waldo G. Morse, opposed.

Motion denied, with ten dollars costs.

In the Matter of the Application of the GEORGE B. WRAY
DRUG COMPANY for a Voluntary Dissolution. (No. 2.)
BENJAMIN S. COMSTOCK et al., Appellants; HARRY R. HICKS,
as Receiver, etc., Respondent.

Matter of George B. Wray Drug Co., 83 App. Div. 634, appeal dismissed.
(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 24, 1903, which affirmed an order of Special Term denying a motion to compel the clerk of Westchester county to certify appellants' papers on appeal.

The motion was made upon the grounds that the order appealed from was not a final order in a special proceeding, that no allowance of the appeal had been granted, nor had the Appellate Division certified that any question was involved which ought to be determined by the Court of Appeals.

Ralph E. Prime, Jr., for motion.

Waldo G. Morse opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT
No. 6 OF THE TOWN OF CORTLANDT, Appellant, v. THE
BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT
No. 7 OF THE TOWN OF CORTLANDT, Respondent.

Reported below, 76 App. Div. 355.
(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 14, 1902, which reversed an order of Special Term overruling a demurrer to the complaint.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

D. S. Herrick for motion.

Elbert P. James opposed.

Motion denied, with ten dollars costs.

MELLE S. T. WERNER, Respondent, *v.* WILLIAM R. HEARST,
Appellant. (Actions 1 and 2.)

Reported below, 76 App. Div. 375.

(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 16, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the ground that the only questions of law involved which the Court of Appeals had jurisdiction to consider had become abstract.

Roger M. Sherman for motion.

David B. Hill opposed.

Motion denied, with ten dollars costs.

ROBERT BOYD, Appellant, *v.* THE NEW YORK SECURITY AND
TRUST COMPANY et al., Respondents.

Reported below, 85 App. Div. 581.

(Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 4, 1903, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that the judgment appealed from was not appealable of right to the Court of Appeals, and that permission to appeal had not been granted nor had the Appellate Division certified that a question of law was involved which ought to be reviewed.

James F. O'Beirne for motion.

Lewis Johnston opposed.

Motion denied, with ten dollars costs.

SARAH IRENE LANE, as Administratrix of the Estate of CHARLES W. D. LANE, Deceased, Respondent, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

Lane v. Brooklyn Heights R. R. Co., 85 App. Div. 85, appeal dismissed. (Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 19, 1903, which affirmed an order of Special Term denying a motion for a new trial upon the ground of alleged newly-discovered evidence.

The motion was made upon the grounds that the order appealed from was not a final order in the action nor had permission to appeal therefrom been granted.

James C. Cropsey for motion.

George D. Yeomans opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* CHARLES CLIFTON, Appellant, *v.* JOSEPH H. DE BRAGGA, as Sheriff of Queens County, et al., Respondents.

People ex rel. Clifton v. De Bragga, 73 App. Div. 579, appeal dismissed. (Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial depart-

ment, entered June 13, 1902, which affirmed an order of the Queens County Court dismissing writs of habeas corpus and certiorari herein and remanding the relator to the custody of the defendant.

The motion was made upon the ground that the grand jury having failed to find an indictment against the relator, the complaint against him had been dismissed.

John B. Merrill for motion.

Charles S. Hayes opposed.

Motion granted and appeal dismissed, with costs of appeal and ten dollars costs of motion.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CLARENCE G. DINSMORE, Respondent, v. H. FREMONT VANDEWATER et al., Individually and as Members of the Town Board of the Town of Hyde Park et al., Appellants.

People ex rel. Dinsmore v. Vandewater, 83 App. Div. 60, appeal dismissed. (Argued October 5, 1903; decided October 13, 1903.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 25, 1903, which affirmed an order of Special Term denying a motion to quash a writ of certiorari.

The motion was made upon the ground that the order appealed from was not appealable to the Court of Appeals.

Edgerton L. Winthrop, Jr., for motion.

Harry C. Barker opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

ALICE I. BIRRELL, Respondent, v. THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants.

(Submitted October 5, 1903; decided October 13, 1903.)

MOTION to amend remittitur. (See 173 N. Y. 644.)

Motion granted, without costs, and remittitur amended by adding thereto: "That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892, and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14, and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

JOHN KEIRNS, Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants.

(Submitted October 5, 1903; decided October 13, 1903.)

MOTION to amend remittitur. (See 173 N. Y. 642.)

Motion granted, without costs, and remittitur amended by adding thereto, "That in said suit or action there was drawn in question the validity of chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to section 1 of article 14 and the amendments thereto, and of section 10 of article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

In the Matter of the Application of JOHN J. STEWART, Appellant, for a Peremptory Writ of Mandamus against FRANCIS G. WARD, as Commissioner of Public Works of the City of Buffalo, et al., Respondents.

(Submitted October 5, 1903; decided October 13, 1903.)

Motion for reargument denied, without costs. (See 173 N. Y. 608.)

LAFAYETTE L. LONG, Appellant, *v.* JOHN RICHMOND,
Respondent.

(Submitted October 5, 1903; decided October 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
175 N. Y. 495.)

BERNARD WELLE, Appellant, *v.* THE CELLULOID COMPANY,
Respondent.

(Submitted October 5, 1903; decided October 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
175 N. Y. 401.)

CHARLOTTE Y. ACKERMAN, Appellant and Respondent, *v.*
CLARENCE F. TRUE, Respondent and Appellant.

(Submitted October 5, 1903; decided October 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
175 N. Y. 353.)

HORACE RUSSELL et al., as Executors and Trustees under the
Will of HENRY HILTON, Deceased, Appellants and Respond-
ents, *v.* EDWARD B. HILTON et al., Respondents.

ALBERT B. HILTON et al., Appellants; HELEN HILTON et al.,
Respondents and Appellants.

(Submitted October 5, 1903; decided October 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
175 N. Y. 525.)

DR. DADIRRIAN AND SONS COMPANY, Respondent, *v.* WILLIAM
HAUENSTEIN, Appellant.

(Submitted October 5, 1903; decided October 13, 1903.)

Motion for reargument denied, with ten dollars costs. (See
175 N. Y. 522.)

WILLIAM SIMIS, as General Guardian of WILLIAM SIMIS, et al.,
Plaintiffs, v. CHARLOTTE WHITE, Appellant, Impleaded with
Others.

HENRY J. COGGESHALL, as Receiver of THE MUTUAL BENEFIT
LOAN AND BUILDING COMPANY, Respondent.

Simis v. White, 85 App. Div. 618, affirmed.

(Submitted October 5, 1903; decided October 20, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the second judicial department, entered
June 17, 1903, which affirmed an order of the Kings County
Court in surplus money proceedings.

*George W. McKenzie, Hamilton Anderson and George P.
Beebe* for appellant.

Edward C. Rice for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN,
VANN, CULLEN and WERNER, JJ.

In the Matter of the Application of THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY for the Closing of
Certain Grade Crossings in the Town of Gates.

THE TOWN OF GATES, Appellant; THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY et al., Respondents.

Matter of N. Y. C. & H. R. R. R. Co., 79 App. Div. 643, affirmed.

(Argued October 5, 1903; decided October 20, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
January 19, 1903, which affirmed a determination of the
board of railroad commissioners closing certain grade cross-
ings in the town of Gates.

George P. Decker for appellant.

Edvard Harris for respondents.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN,
VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM
H. ARNOLD, Appellant, v. THOMAS L. FEITNER et al., as
Commissioners of Taxes and Assessments of the City of
New York, Respondents.

People ex rel. Arnold v. Feitner, 76 App. Div. 620, affirmed.
(Argued October 5, 1903; decided October 20, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the first judicial department, entered
November 28, 1902, which affirmed an order of Special Term
quashing a writ of certiorari to review the action of the
defendants in assessing the relator's personal estate for the
purpose of taxation.

Walter Large for appellant.

George L. Rives, Corporation Counsel (*David Rumsey*
and *James M. Ward* of counsel), for respondents.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN,
VANN, CULLEN and WERNER, JJ.

In the Matter of the Application of CAMILLE WEIDENFELD,
Appellant, for a Peremptory Writ of Mandamus against
RUDOLPH KEPPLER, as President of the New York Stock
Exchange, Respondent.

Matter of Weidenfeld v. Keppler, 84 App. Div. 285, affirmed.
(Argued October 6, 1903; decided October 20, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the first judicial department, entered June
16, 1903, which affirmed an order of Special Term denying a

motion for a peremptory writ of mandamus to compel defendant to restore the relator to membership in the New York Stock Exchange.

Herbert R. Limburger, Edward Lauterbach, Henry L. Scheuerman and G. Thornton Warren for appellant.

Lewis Cass Ledyard for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM A. YOUNG, Respondent, v. THOMAS STURGIS, as Fire Commissioner of the City of New York, Appellant.

People ex rel. Young v. Sturgis, 85 App. Div. 20, affirmed.
(Argued October 6, 1903; decided October 20, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 18, 1903, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to give relator employment in the fire department of the city of New York.

George L. Rives, Corporation Counsel (James McKeen of counsel), for appellant.

Joseph A. Burr for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Accounting of the UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee under the Will of HELENA ROGERS, Deceased, Respondent.

JOHN FERDON ROGERS, Appellant.

(Submitted October 5, 1903; decided October 20, 1903.)

Motion for reargument denied, with ten dollars costs. (See 175 N. Y. 304.)

In the Matter of the Application of SPENCER CLINTON et al., as Executors of CHANDLER J. WELLS, Deceased, Respondents, for a Peremptory Writ of Mandamus against ADAM BOECKEL, as Treasurer of the City of Buffalo, Appellant.

Matter of Clinton v. Boeckel, 79 App. Div. 645, affirmed.
(Argued October 7, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 20, 1903, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus directing the defendant to receive from the relators the amount of tax due from them on certain lands in the city of Buffalo.

Percy S. Lansdowne and *Charles L. Feldman* for appellant.

Ulysses S. Thomas for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Application of THE BROOKLYN TEACHERS' ASSOCIATION et al., Respondents, for a Peremptory Writ of Mandamus against THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et al., Appellants.

Matter of Brooklyn Teachers' Association, 85 App. Div. 47, affirmed.
(Argued October 7, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1903, which reversed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendants to place the names of certain persons upon the special list of persons eligible for promotion in the public schools of the city of New York and granted such writ.

George L. Rives, Corporation Counsel (James McKeen and Walter S. Brewster of counsel), for appellants.

Ira Leo Bamberger for respondents.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Appraisal of the Estate of JAMES S. GIBBES, Deceased, under the Transfer Tax Act.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant ;
CHARLES H. SIMONTON et al., as Trustees for the CITY OF
CHARLESTON, SOUTH CAROLINA, et al., Respondents.

Matter of Gibbs, 84 App. Div. 510, affirmed.

(Argued October 7, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1903, which reversed an order of the New York County Surrogate's Court appraising the estate of James S. Gibbs, deceased, under the Transfer Tax Act.

Bertram L. Kraus and Henry B. Wesselman for appellant.

Richard Reil Rogers and James F. Horan for respondents.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE BLAIR, Respondent, v. HOMER FOLKS, as Commissioner of Public Charities of the City of New York, Appellant.

People ex rel. Blair v. Folks, 86 App. Div. 626, affirmed.

(Submitted October 7, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July

27, 1903, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to reinstate the relator in the position of superintendent of out-door poor in the city of New York.

George L. Rives, Corporation Counsel (Theodore Connolly and William B. Crowell of counsel), for appellant.

Asa Bird Gardiner for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Petition of WARREN CRUIKSHANK, Appellant, for an Order Canceling Liquor Tax Certificate No. 2,901, Issued to HENRY HESTERBERG, Respondent.

Matter of Cruikshank, 82 App. Div. 645, affirmed.
(Submitted October 7, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 27, 1903, which affirmed an order of Special Term denying a petition for an order canceling and revoking a liquor tax certificate.

George C. Case for appellant.

Hugo Hirsh for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Application of ADELE TILLOTSON PIERIS, Respondent, for an Order to Determine the Lien of GEORGE WILLIAM CLUNE, an Attorney, Appellant.

Matter of Pieris, 82 App. Div. 466, affirmed.
(Argued October 7, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

July 14, 1903, which affirmed an order of Special Term confirming the report of a referee appointed in the above-entitled proceeding.

Thomas Abbott McKennell for appellant.

Francis A. McCloskey for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, Appellant, v. ROBERT GRIER MONROE, as Commissioner of Water Supply, Gas and Electricity of the City of New York, et al., Respondents.

People ex rel. Consolidated T. & E. Subway Co. v. Monroe, 85 App. Div. 542, affirmed.

(Argued October 8, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered August 3, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant commissioner of water supply, gas and electricity to issue to the relator permits to open the streets of the city of New York for the purpose of constructing ducts for electrical conductors.

Henry J. Hemmens and *Samuel A. Beardsley* for appellant.

James Byrne for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Application of CHARLES SCHLIVINSKI, by HYMAN SCHLIVINSKI, his Guardian ad Litein, Appellant, for a Peremptory Writ of Mandamus against WILLIAM H. MAXWELL, as City Superintendent of Schools of the City of New York, Respondent.

Matter of Schlivinski v. Maxwell, 80 App. Div. 313, appeal dismissed. (Argued October 8, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 13, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to make and file in his office one complete list of all persons to whom teacher's license No. 1 has been issued and to place thereon the name of the relator in its proper place.

Abram Shlivek for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly*, *James McKeen* and *Walter S. Brewster* of counsel), for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ISIDORE S. CHIRURG, Appellant, v. WILLIAM M. CALDER, as Superintendent of Buildings for the Borough of Brooklyn, City of New York, Respondent.

People ex rel. Chirurg v. Calder, 75 App. Div. 625, affirmed. (Submitted October 8, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 14, 1902, which affirmed an order of Special Term

denying a motion for an alternative writ of mandamus to compel the reinstatement of relator as a clerk in the bureau of buildings of the borough of Brooklyn.

May & Fragner for appellant.

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for respondent.

Order affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

ELLIS GOLDBERG, Respondent, *v.* GEORGE M. JACOBS et al.,
Composing the Firm of JOSEPH F. JACOBS & Co., et al.,
Defendants.

In the Matter of the Application of JOSEPH F. JACOBS,
Appellant, to Cancel and Discharge of Record the Judgments Herein.

Goldberg v. Jacobs, 86 App. Div. 626, affirmed.
(Argued October 8, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 14, 1903, which affirmed an order of Special Term denying a motion for the cancellation of two judgments under section 1268 of the Code of Civil Procedure.

Alexander Lehman and *Ambrose G. Todd* for appellant.

C. F. Goddard for respondent.

Order affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Appraisal of the Estate of **ELIZABETH L. HOWE**, Deceased, under the Transfer Tax Act.

JOHN W. KIMBALL, as Treasurer of Kings County, Appellant;
LEAVITT HOWE et al., as Trustees, Respondents.

Matter of Howe, 86 App. Div. 286, affirmed.
(Argued October 9, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 24, 1903, which affirmed an order of the Kings County Surrogate's Court assessing the transfer tax on the estate of Elizabeth L. Howe, deceased.

Robert B. Bach for appellant.

C. W. West for respondents.

Order affirmed, with costs, on opinion below.

CONCUR: O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not sitting: PARKER, Ch. J.

In the Matter of the Probate of the Will of **WILLIAM M. RICE**, Deceased.

ALBERT T. PATRICK, Appellant; **JOHN D. BARTINE**, Respondent.

Matter of Rice, 81 App. Div. 322, affirmed.
(Argued October 12, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 30, 1903, which affirmed a decree of the New York County Surrogate's Court refusing probate to an alleged will of William M. Rice, deceased, bearing date June 30, 1900, and admitting to probate the will of said deceased bearing date September 26, 1896.

John C. Tomlinson, Max J. Kohler and Edgar J. Kohler for appellant.

William B. Hornblower, John M. Bowers, James Byrne Leo N. Levi and Mark W. Potter for respondent.

Motion to dismiss above appeal denied, without costs. Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WALTER McBAIN, Appellant, v. EDWARD H. WISWALL et al., as the Board of Town Auditors of the Town of Colonie, Respondents.

People ex rel. McBain v. Wiswall, 84 App. Div. 635, affirmed. (Argued October 12, 1903; decided October 27, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 7, 1903, which confirmed the action of the defendants in auditing the relator's claim for services as overseer of the poor of the town of Colonie.

J. S. Frost for appellant.

George W. Stedman for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

CHARLES A. BROWN et al., Appellants, v. THE CITY OF NEW YORK et al., Respondents.

Brown v. City of New York, 78 App. Div. 361, affirmed. (Argued October 19, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 10, 1903, affirming a judgment in favor of defendants

entered upon a dismissal of the complaint by the court on trial at Special Term.

L. Laflin Kellogg and Alfred C. Petté for appellants.

George L. Rives, Corporation Counsel (Theodore Connolly of counsel), for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

HENRY A. EPISCOPO, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant, et al., Respondents.

Episcopo v. Mayor, etc., of N. Y., 80 App. Div. 627, affirmed.
(Submitted October 19, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 27, 1903, affirming a judgment in favor of plaintiff and defendants, respondents, entered upon a decision of the court on trial at Special Term.

George L. Rives, Corporation Counsel (Theodore Connolly and Terence Farley, of counsel), for appellant.

Gilbert Ray Hawes for plaintiff, respondent.

L. Laflin Kellogg, Alfred C. Petté, Charles W. Dayton, F. E. M. Bullowa, J. Woolsey Shepard, R. A. Stacpoole and Austin E. Pressinger for defendants, respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

MICHAEL J. MACK, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Mack v. Mayor, etc., of N. Y., 82 App. Div. 637, affirmed.
(Argued October 19, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 13, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

L. Laflin Kellogg and *Alfred C. Petté* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Charles A. O'Neil* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

THOMAS McNAMARA et al., Composing the Firm of McNAMARA AND COMPANY, Appellants, *v.* WILLIAM R. WILLOOX, as Commissioner of Parks for the Boroughs of Manhattan and Richmond in the City of New York, Respondent.

McNamara v. Wilcox, 81 App. Div. 635, affirmed.
(Argued October 19, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 18, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

Arthur C. Butts for appellants.

George L. Rives, Corporation Counsel (*Theodore Connolly* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, HAIGHT, VANN and WERNER, JJ. Dissenting: PARKER, Ch. J., MARTIN and CULLEN, JJ.

ALFRED POTS, Appellant, v. DAVID E. SICHER, Respondent.

Pots v. Sicher, 66 App. Div. 614, affirmed.

(Argued October 14, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 26, 1901, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Jesse W. Johnson for appellant.

Daniel P. Hays for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J.; GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES R. McCULLOUGH, Appellant, v. JONATHAN D. WILSON et al., Constituting the Board of Public Works of the City of Newburgh, et al., Respondents.

People ex rel. McCullough v. Wilson, 80 App. Div. 640, appeal dismissed.
(Argued October 8, 1903; decided October 30, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 17, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus.

Robert H. Barnett for appellant.

C. L. Waring for respondents.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J.; O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

HEMAN STANNARD et al., as Administrators of the Estate of
HEMAN STANNARD, Deceased, Respondents, v. JOSEPH
GREEN, Appellant.

Stannard v. Green, 62 App. Div. 631, affirmed.
(Argued October 14, 1903; decided October 30, 1903.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the third judicial department, entered
July 17, 1901, affirming a judgment in favor of plaintiff
entered upon the report of a referee.

J. B. McCormick for appellant.

No one for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

CORA CHESTER TRIPP, Respondent, v. GEORGE T. CHESTER,
Individually, and as Executor of MARY P. CHESTER,
Deceased, Appellant, Impleaded with Others.

Tripp v. Chester, 66 App. Div. 623, affirmed.
(Argued October 13, 1903; decided October 30, 1903.)

APPEAL from a judgment, entered June 3, 1902, upon an
order of the Appellate Division of the Supreme Court in the
fourth judicial department, affirming an interlocutory judg-
ment in favor of plaintiff entered upon a decision of the court
on trial at an Equity Term.

Frank C. Ferguson for appellant.

Adelbert Moot for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT,
HAIGHT, MARTIN and VANN, JJ.

STEVENS VOISIN, Plaintiff, *v.* THE THAMES AND MERSEY MARINE INSURANCE COMPANY, Respondent.

GEORGE FREEFELD, as Receiver of STEVENS VOISIN, Appellant; MITCHELL & MITCHELL, Respondent.

Voisin v. Thames & Mersey M. Ins. Co., 84 App. Div. 642, appeal dismissed.

(Argued October 9, 1903; decided October 30, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 29, 1903, which affirmed an order of Special Term denying a motion to vacate and set aside an order of discontinuance.

H. A. Vieu and *A. H. Parkhurst* for appellant.

C. N. Bovee, Jr., and *Wilhelmus Mynderse* for respondents.

Appeal dismissed, with costs; no opinion.

CONCUR: O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

FRANCIS X. ZAPF, Appellant, *v.* LULU N. CARTER, Respondent.

Zapf v. Carter, 70 App. Div. 395, appeal dismissed.

(Argued October 15, 1903; decided October 30, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 22, 1902, reversing an interlocutory judgment in favor of plaintiff entered upon the report of a referee and granting a new trial.

John Conboy for appellant.

George C. Carter for respondent.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not voting: O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CITY AND WESTCHESTER RAILWAY COMPANY, Appellant, v. THE BOARD OF RAILROAD COMMISSIONERS et al., Respondents.

People ex rel. N. Y. City & W. R. Co. v. Bd. R. R. Comrs., 81 App. Div. 387, affirmed.

(Argued October 6, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered April 4, 1903, which confirmed a determination of the board of railroad commissioners granting to the respondent New York and Port Chester Railroad Company a certificate of public convenience and necessity under section 59 of the Railroad Law.

David B. Hill and *J. Tredwell Richards* for appellant.

Judson S. Landon, *William C. Trull* and *Frank Sullivan Smith* for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J.; O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ELLA BEEBE, Appellant, v. THE WARDEN OF THE CITY PRISON OF THE BOROUGH OF MANHATTAN, CITY OF NEW YORK, et al., Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LEAH VAN LINDA, Appellant, THE WARDEN OF THE CITY PRISON OF THE BOROUGH OF MANHATTAN, CITY OF NEW YORK, et al., Respondents.

People ex rel. Beebe v. Warden, etc., 86 App. Div. 626, affirmed.

People ex rel. Van Linda v. Warden, etc., 86 App. Div. 626, affirmed.

(Submitted October 19, 1903; decided November 10, 1903.)

APPEALS from orders of the Appellate Division of the Supreme Court in the first judicial department, entered July

18, 1903, which affirmed orders of Special Term dismissing writs of habeas corpus and certiorari and remanding relators to custody.

I. Henry Harris and Leon Kronfeld for appellants.

William Travers Jerome (Arthur C. Train and Henry G. Gray of counsel) for respondents.

Orders affirmed ; no opinion.

Concur: GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

PARKER, Ch. J. (dissenting). There is evidence tending to show that relator exacted more than 6% interest as the condition of making a loan of \$225 to complainant. Complainant neither offered nor gave security for the loan. The question presented to this court is whether a loan made under such circumstances constitutes a misdemeanor under section 378, Penal Code. My associates are of the opinion that it does. While I dissent from that view, I admit that the section standing by itself justifies it. Indeed I think the concession is fairly called for that a natural and ordinary reading of the section, without having in mind other statutes and the circumstances attending the amendment of the section in 1895, would lead to the conclusion that the section makes the loan of money without security at a usurious rate of interest a misdemeanor.

Courts do not, however, always construe a statute according to its strict letter. It is a cardinal principle of construction, often and wisely employed, that statutes should be construed according to the intent of the law-making power, and to that end the letter must give way. As this court says in *Delafield v. Brady* (108 N. Y. 524, 529): "Statutes framed in general terms frequently embrace things which are not within the intent of the law makers, and sometimes things within such intent are not within the letter. Hence, in construing statutes, it has frequently been held that a thing which is within the letter of a statute is not within the statute unless it be within the intent of the law makers." The court cites in support of such proposition a number of authorities

in this state, among them *L. S. & M. S. Ry. Co. v. Roach* (80 N. Y. 339, 344) in which the court says: "It cannot be doubted that the law makers did not intend that this law should be applied in such cases; and yet they are within the letter of the law. The law makers cannot always foresee all the possible applications of the general language they use; and it frequently becomes the duty of the courts in construing statutes to limit their operation, so that they shall not produce absurd, unjust or inconvenient results not contemplated or intended. A case may be within the letter of the law and yet not within the intent of the law makers; and in such a case a limitation or exception must be implied."

It is true that as the section stood prior to the act of 1895 the taking under any circumstances of a greater interest than that allowed by law constituted a misdemeanor, and it was made so by chapter 676, Laws 1881. (Penal Code.) But very shortly the legislature began to create exceptions, presumably because it was discovered that the statute injured those it was intended to benefit, and that economically considered it was framed on anti-business principles, without having behind it the power to make business principles give way.

Rates of interest in the business world are at all times affected by the character of the security. Money may be borrowed with government bonds as collateral at half the legal rate when a loan upon other securities less marketable, and having something of a speculative character, will call for the full legal rate. So, too, money may be borrowed upon a bond secured by a mortgage on marketable real estate for less than half its value at 4% or less, when 5% or 6% will be required if so large a loan be applied for as will approximate the full value of the real estate, and this is so because the element of risk as to some part of the investment is introduced by the necessity for a greater loan. And whenever that element enters, the more conservative financial institutions and individuals refuse to make a loan, and those who are willing to take something of a risk demand extra compensation for it, and if they cannot secure it the loan will not be made.

The person who desires to borrow having no personal property to offer as collateral security, or real estate to mortgage,

finds it difficult to borrow, however much he may need money, and however well intentioned and honest he may be, because there is in his case the possibility that sickness may postpone the payment of the loan, or death make its collection impossible. And in such case the risk of a loan is very considerable, and men of means will generally refuse to take the chances unless they receive compensation for the risk. A statute, therefore, which subjects a man to fine or imprisonment, or both, for accepting more than 6% interest naturally operates, in times at least when rates of money are ruling high, to deprive the man without securities to pledge of an opportunity to borrow money, however pressing may be the necessity for it, whether caused by illness in his family or impending disaster which could be averted by the money which he would borrow, even should its repayment with interest require a very substantial part of all his possible earnings for a considerable period in the future. A statute accomplishing such a result should be entitled, "An act to prevent a man without means from borrowing money." This statute should not be so construed as to accomplish such a result if from an examination of it in the light of other statutes, and the circumstances surrounding their enactment, it is apparent that the legislature intended otherwise.

Now it seems that, as has already been suggested, almost immediately after the enactment of section 378, Penal Code, in 1881, it was discovered by those charged with the responsibility of legislation that the section was too drastic, and the year following an exception to the general law was created by what is known as the "Demand Loan Act" (Laws 1882, ch. 257), entitled "An act in relation to advances of money upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit and other negotiable instruments." It provided in effect that where moneys were advanced payable on demand in an amount more than \$5,000, with securities of the kind suggested in the title pledged as collateral for such payment, it should be lawful to receive as compensation for the loan any sum agreed upon in writing by the parties.

Why it should then be insisted that a man without any collateral whatever to pledge should not be permitted to compen-

sate one who should advance to him money at any rate agreed upon between them in writing is difficult of comprehension. Certainly it would seem that he would find it much more difficult to secure a loan of money than the one with good collateral to pledge.

In 1883 another exception to the general usury law was created by section 7 of what is known as the "Pawnbrokers' Act" (Laws 1883, ch. 339).

These statutes have no direct bearing upon the question of the construction to be given to the section in question, and are referred to only because they show the tendency to relieve certain parties from the drastic effects of the general usury law. But when section 378, Penal Code, was so amended by ch. 72, Laws 1895, as to present the question we now have before us — Whether by it the legislature intended to so modify the section as that the loan of money at a usurious rate of interest when not secured by certain prohibited personality should not constitute a misdemeanor? — chapter 326, Laws 1895, was also enacted creating another exception to the general usury law in favor of certain corporations loaning not more than \$200 at specified rates of interest for a certain limited period of time. Section 5 of that act reads as follows:

"In any such county no person or corporation, other than corporations organized pursuant to this act, shall, directly or indirectly, charge or receive any interest, discount or consideration greater than at the rate of six per cent per annum upon the loan, use or forbearance of money, goods or things in action less than two hundred dollars in amount or value, or upon the loan, use or sale of personal credit in any wise, where there is taken for such loan, use or sale of personal credit any security upon any household furniture, apparatus or appliances, sewing machine, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry. The foregoing prohibition shall apply to any person who, as security for any such loan, use or forbearance of money, or for any such loan, use or sale of personal credit as aforesaid, makes a pretended purchase of property from any person and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for his services

or otherwise, seeks to obtain a larger compensation in any case hereinbefore provided for. Any person, and the several officers of any corporation, who shall violate the foregoing prohibition, shall be guilty of a misdemeanor, and upon proof of such fact the debt shall be discharged and the security shall be void. But this section shall not apply to licensed pawnbrokers, making loans upon the actual and permanent deposit of personal property as security; nor shall this section affect in any way the validity or legality of any loan of money or credit exceeding two hundred dollars in amount."

It will be noted that this section prohibits the taking of a greater rate of interest than 6% per annum "upon the loan, use or forbearance of money, goods or things in action less than two hundred dollars in amount or value, or upon the loan, use or sale of personal credit in any wise, where there is taken *for such loan, use or sale of personal credit any security* upon any household furniture, apparatus or appliances, sewing machine, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry." By this section then neither the loan, use nor sale of personal credit without security at a greater rate of interest than 6% per annum is prohibited.

Now turning to section 378, Penal Code, which was *amended* the same year the act from which we have quoted was *passed* — by which there is added to section 378 language never there before, either in substance or spirit, and which language added is almost identical with the language found in section 5 already quoted — we find that it is capable of such a construction as makes a difference between "loan or forbearance of money" and the "use or sale of personal credit," in that a loan at a usurious rate, whether the prohibited security be taken or not, constitutes a misdemeanor, while the use or sale of personal credit does not unless secured "upon any household furniture, sewing machine, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry."

No good reason has been advanced — nor do I think can be — for any such distinction, and that the legislature saw no reason for the distinction is evidenced by section 5 of the Corporation Loan Law, which, as we have seen, places both

upon the same footing. The legislature attempted to amend section 378, as it seems to me, so that it should harmonize with the letter and the spirit of the Corporation Loan Law — which was in process of enactment at the same time, and which called its attention to a direction in which the pledging of certain classes of security for money loaned at a usurious rate could be made to work most disastrously to families in humble financial circumstances — and it provided that a loan or sale of personal credit where articles therein named were taken as security should constitute a misdemeanor, otherwise a usurious loan by such a corporation was not prohibited.

Now, section 378, as it then stood, made it a misdemeanor to loan money at a greater than lawful interest, and the draftsman of the amendment to section 378 — by which it was intended, as it seems to me, very clearly, to harmonize that section with section 5 of the Corporation Loan Law — so prepared it that the section reads as follows :

“A person who, directly or indirectly, receives any interest, discount or consideration upon the loan or forbearance of money, goods or things in action, or upon the loan, use or sale of his personal credit in anywise, where there is taken for such loan, use or sale of personal credit security upon any household furniture, sewing machines, plate or silverware, in actual use, tools or implements of trade, wearing apparel or jewelry, or as security for the loan, use or sale of personal credit as aforesaid, makes a pretended purchase of such property from any person, and permits the pledgor to retain the possession thereof, greater than six per centum per annum, is guilty of a misdemeanor.”

It will be seen that the original section was left standing, but before the words “greater than is allowed by statute is guilty of a misdemeanor” the substance of the provisions in section 5 was inserted, and in many substantial respects the phraseology of section 5 was employed, beginning with the words “or upon a loan.”

In its reference to pretended purchase of property section 378, as amended, uses the words “or as security for the loan, use or sale of personal credit,” while section 5 reads, “as secu-

urity for any such loan, use or forbearance of money, or for any such loan, use or sale of personal credit." This difference presents an opportunity for so reading the two statutes that the loan of money shall be placed on a different basis than the use or sale of personal credit, the Penal Code making it a misdemeanor under all circumstances and section 5 of the other statute only when it is secured in some method by property of the kind mentioned in the statute. But this, I think, was not the intention of the lawmakers.

The facts to which reference has been made and the inferences of fact fairly deducible therefrom may be summed up as follows: In 1895 the legislature, for the first time, was forcibly impressed with the importance of enabling a man without means to secure a needed loan although a greater than the legal rate of interest must be paid for that purpose, and at the same time to secure his family from the possibility of being subjected to the loss of household necessities in order to satisfy the debt, and a statutory scheme looking to that end was devised, which may have had behind it the intelligent direction and push of philanthropists. Because that proposed enactment, which subsequently ripened into law, found favor, it became necessary to amend the Penal Code so that it should be in accord with the new policy regarding those having necessity for small loans; hence the amendment to section 378, Penal Code, by incorporating therein the substance of the provisions of the new act. The amendment was apparently drawn by a different and less cautious draftsman, and led to an enactment which results in this controversy as to the intent of the legislature. No reason has been presented, nor can there be, for the difference which it is contended exists between the two acts. Therefore, it would seem, in the light of all the legislation bearing on the subject, that such difference was due to mistake rather than intention. If that be so, it would follow that we should read the statute as not declaring a person guilty of a misdemeanor who exacts more than the legal rate of interest upon a simple loan of money. As I think it should be so read, I advise a reversal of the orders appealed from.

THE CITY OF NEW YORK, Respondent, *v.* McCALDIN BROTHERS
COMPANY, Appellant.

City of New York v. McCaldin Bros. Co., 81 App. Div. 622, affirmed.
(Argued October 20, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 22, 1903, reversing a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury and granting a new trial.

William L. Turner and *Frank D. Arthur* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connoly*, *Martin Saxe* and *Henry M. Powell* of counsel), for respondent.

Order affirmed on opinion below, and judgment absolute ordered for plaintiff on the stipulation, with costs.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

BRIAN G. HUGHES, Appellant, *v.* THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Hughes v. Mayor, etc., of New York, 84 App. Div. 347, affirmed.
(Argued October 21, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1903, affirming a judgment in favor of defendant entered upon a verdict.

L. Laflin Kellogg and *Alfred C. Petté* for appellant.

George L. Rives, Corporation Counsel (*Theodore Connoly* and *Chase Mellen* of counsel), for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

MACKNIGHT FLINTIC STONE COMPANY, Appellant, v. THE CITY OF NEW YORK et al., Respondents. (Actions 1 and 2.)

MacKnight Flintic Stone Co. v. City of New York, 78 App. Div. 640, 641, affirmed.

(Argued October 22, 1908; decided November 10, 1908.)

APPEALS from judgments of the Appellate Division of the Supreme Court in the first judicial department, entered January 20, 1903, affirming judgments in favor of defendants entered upon dismissals of the complaints by the court on trial at Special Term.

L. Laflin Kellogg and *Alfred C. Petté* for appellant.

Louis Marshall for respondents.

Judgments affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

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WILLIAM WEIDMAN, Appellant, v. THE CITY OF NEW YORK, Respondent.

Weidman v. City of New York, 84 App. Div. 321, affirmed.

(Argued October 22, 1908; decided November 10, 1908.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 23, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

W. M. Rosebault for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly of counsel), for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

THOMAS J. McCABE, Appellant, v. THE CITY OF NEW YORK,
Respondent.

McCabe v. City of New York, 77 App. Div. 637, affirmed.
(Submitted October 22, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 17, 1902, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and granting a new trial.

Isidore S. I. Chirurg for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *Chase Mellen* of counsel), for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Accounting of PETER ROSE, as Executor
of PHILIP B. ROSE, Deceased, Appellant.

CATHERINE M. ROSE et al., Respondents.

Matter of Rose, 75 App. Div. 615, affirmed.
(Submitted October 22, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 17, 1902, which affirmed a decree of the Rensselaer County Surrogate's Court surcharging the account of Peter Rose, as executor of Philip B. Rose, deceased.

J. A. Cipperly for appellant.

Clarence W. Betts for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

HUTCHINSON SOUTHGATE, as Trustee under the Will of CHARLES L. R. HUTCHINSON, Deceased, Appellant, Impleaded with Another, v. THE CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK et al., Respondents, and RENEE C. SOUTHGATE et al., Appellants and Respondents.

Southgate v. Continental Trust Co., 74 App. Div. 150, affirmed.
(Argued October 22, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 17, 1902, modifying and affirming as modified a judgment of Special Term construing the will of Charles L. R. Hutchinson, deceased.

O. J. Wells for appellant.

Percival S. Menken for Henry Southgate, as trustee for Harriet Whitmore, appellant and respondent.

Sherman Evarts for Harriet A. Whitmore, appellant and respondent.

Judgment affirmed, without costs, on opinion of PATTERSON, J., below.

CONCUR: PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ.

AUGUSTUS H. SKILLIN, as Trustee of DAVID MAIBRUNN, a Bankrupt, Respondent, v. DAVID MAIBRUNN et al., Appellants, Impleaded with Others.

Skillin v. Maibrunn, 75 App. Div. 588, affirmed.
(Argued October 23, 1903; decided November 10, 1903.)

APPEAL from a judgment, entered January 23, 1903, upon an order of the Appellate Division of the Supreme Court in the first judicial department, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Jacob Fromme for appellants.

Charles Goldzier and *Louis J. Vorhaus* for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, HAIGHT, MARTIN, VANN,
CULLEN and WERNER, JJ.

JOHN E. BRANDEGEE, as Executor of MARY E. HACKETT,
Deceased, Respondent, v. THE METROPOLITAN LIFE INSUR-
ANCE COMPANY, Appellant.

Brandegee v. Metropolitan L. Ins. Co., 78 App. Div. 629, affirmed.
(Argued October 26, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
January 5, 1903, affirming a judgment in favor of plaintiff
entered upon a verdict and an order denying a motion for a
new trial.

J. W. Rayhill for appellant.

F. G. Fincke for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MAR-
TIN, CULLEN and WERNER, JJ.

GEORGE N. SEGER, as Administrator of the Estate of LOUISA
SCHAEFFLER, Deceased, Respondent, v. THE FARMERS'
LOAN AND TRUST COMPANY, as Substituted Trustee under
the Will of CAROLINE WILDBERGER, Deceased, Appellant,
Impleaded with Another.

Seger v. Farmers' Loan & Trust Co., 78 App. Div. 293, reversed.
(Argued October 26, 1903; decided November 10, 1903.)

APPEAL from a judgment, entered November 24, 1902,
upon an order of the Appellate Division of the Supreme
Court in the first judicial department, affirming an interlocu-

tory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

James F. Horan for appellant.

John C. Gulick for respondent.

Judgment reversed and new trial granted, costs to abide event, on dissenting opinions of INGRAHAM and LAUGHLIN, JJ., below.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

OTTO YOUNG, an Infant, by MATHILDE YOUNG, his Guardian ad Litem, Appellant, v. EUGENE DIETZGEN COMPANY, Respondent, Impleaded with Another.

Young v. Eugene Dietzgen Co., 72 App. Div. 618, affirmed.
(Argued October 27, 1908; decided November 10, 1908.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 7, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

John J. Schwartz and *David Burr Luckey* for appellant.

W. W. MacFarland for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

JEANNIE Z. LEGGAT, Respondent, v. MARIETTA LEGGAT, as Executrix of RICHARD J. LEGGAT, Deceased, Appellant.

Leggat v. Leggat, 79 App. Div. 141, affirmed.
(Argued October 27, 1908; decided November 10, 1908.)

APPEAL from a judgment, entered February 11, 1903, upon an order of the Appellate Division of the Supreme Court in

the second judicial department, overruling defendant's exceptions ordered to be heard in the first instance by the Appellate Division and denying a motion for a new trial.

William A. Keener and *A. Delos Kneeland* for appellant.

Joseph A. Burr and *Michael Furst* for respondent.

Judgment affirmed, with costs on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

CAROLINE F. RUNDELL, as Administratrix of the Estate of ELIZA S. RUNDELL, Deceased, Respondent, v. JOHN P. SWARTWOUT, Appellant.

Rundell v. Swartwout, 78 App. Div. 628, affirmed.
(Argued October 27, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 8, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

A. B. Steele for appellant.

George W. Ward for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

ELLA G. LIBBY, Appellant, v. EDMUND VAN DERZEE et al.,
Respondents.

Libby v. Van Derzee, 80 App. Div. 494, affirmed.
(Argued October 27, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 1, 1903, affirming a judgment in favor of defendants

entered upon a dismissal of the complaint by the court on trial at Special Term.

J. J. Bennett for appellant.

William D. Gaillard for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

THOMAS CONNORS, Respondent, *v.* MICHAEL NOONE, as Trustee under the Will of ANNE TRESNAN, Deceased, Appellant.

Connors v. Noone, 84 App. Div. 632, affirmed.

(Submitted October 28, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 11, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Kilby & Norris for appellant.

John N. Carlisle for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

In the Matter of the Accounting of RAY SEMON HATCH, as Executor of ELAM A. HATCH, Deceased, Appellant.

SECURITY TRUST COMPANY, as Substituted Trustee under the Will of LAURA A. HATCH, Deceased, et al., Respondents.

Matter of Hatch, 75 App. Div. 609, affirmed.

(Argued October 28, 1903; decided November 10, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered

July 8, 1902, which affirmed a decree of the Monroe County Surrogate's Court settling the accounts of Ray Semon Hatch, as executor of Elam A. Hatch, deceased.

Clarence W. McKay for appellant.

Hiram R. Wood, William A. Sutherland and *H. B. Hallock* for respondents.

Order affirmed, with costs to respondents against appellant personally; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

THE TWELFTH WARD BANK OF THE CITY OF NEW YORK, Respondent, *v.* FREDERICK H. SCHAUFFLER, as Trustee of ANTONIO RASINES, a Bankrupt, Appellant, and PEDRO ANTONIO RASINES et al., as Executors of AMELIA F. RASINES, Deceased, Respondents.

Twelfth Ward Bank v. Samuels, 71 App. Div. 168, affirmed.
(Argued October 29, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 19, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Hubert E. Rogers for appellant.

Charles W. Dayton and *Joseph E. Bullen* for plaintiff, respondent.

Charles P. Rogers for defendants, respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

MAY IRENE LAFFERTY, an Infant, by WILLIAM H. LAFFERTY, her Guardian ad Litem, Respondent, v. THIRD AVENUE RAILROAD COMPANY, Appellant.

Lafferty v. Third Ave. R. R. Co., 85 App. Div. 592, affirmed.
(Argued October 30, 1903; decided November 10, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 18, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown, Bayard H. Ames and Henry A. Robinson for appellant.

Albert A. Wray for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

THE CITY OF BUFFALO, Appellant, v. THE DELAWARE, LAOKAWANNA AND WESTERN RAILWAY COMPANY, Respondent.

City of Buffalo v. Delaware, L. & W. Ry. Co., 68 App. Div. 488, appeal withdrawn.

(Argued November 16, 1903; decided November 17, 1903.)

MOTION to withdraw part of appeal from judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 19, 1902, which affirmed so much of a judgment of the court on trial at an Equity Term as was in favor of the defendant and reversed so much of said judgment as was in favor of plaintiff and granted a new trial.

The motion was made upon the ground that the appeal from that part of the judgment reversing on the law and the facts and granting a new trial was taken inadvertently, plaintiff's counsel not having in mind the provision of law that the Court of Appeals has no jurisdiction to review where disputed questions of law are involved.

Charles L. Feldman, Corporation Counsel (*Edward L. Jung* of counsel), for motion.

John G. Milburn opposed.

Motion granted upon payment of \$150, and the argument of the appeal remaining in this court is set down for the third Monday of January next.

HENRY A. EPISCOPO, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant, et al., Respondents.

(Submitted November 16, 1903; decided November 17, 1903.)

MOTION to amend remittitur. (See 176 N. Y. 572.)

Motion granted and remittitur amended so as to allow costs to attorneys who separately appeared and filed briefs in this court.

JOHN TRACEY LANGAN, Respondent, *v.* SUPREME COUNCIL AMERICAN LEGION OF HONOR, Appellant.

(Submitted November 9, 1903; decided November 17, 1903.)

Motion for reargument denied, with ten dollars costs. (See 174 N. Y. 266.)

In the Matter of the Probate of the Will of ROBERT E. HOPKINS, Deceased.

ROBERT E. HOPKINS, JR., Appellant; FANNY W. HOPKINS et al., Respondents.

APPEAL — WHEN APPELLATE COURT MAY MAKE ORDER DIRECTING TRIAL BY JURY OF QUESTIONS OF FACT. Under section 2588 of the Code of Civil Procedure an appellate court must "make an order directing the trial by a jury of the material questions of fact arising upon the issues between the parties," where its reversal or modification of a decree is founded upon a question of fact, and it may do it in any other case where, in its opinion, it would seem that the ends of justice might be best promoted by such a course.

(Submitted October 5, 1903; decided November 17, 1903.)

MOTION for reargument. (See 172 N. Y. 360.)

Joseph Middlebrook for motion.

Clarence S. Davison, Charles Blandy and Andrew J. Shipman opposed.

PARKER, Ch. J. The motion for reargument must be denied, without costs, on the ground that the question presented is no longer open for discussion in this court. In reported and unreported cases we have often decided — too often to now discuss the question — that since the enactment of the statute, now to be found in section 2588 of the Code, an appellate court *must* “make an order directing the trial by a jury of the material questions of fact arising upon the issues between the parties” where the reversal or modification of a decree by the appellate court is founded upon a question of fact, and that the appellate court *may* do it in any other case where, in its opinion, it would seem that the ends of justice might be best promoted by such a course.

O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur.

Motion denied, without costs.

ROCHESTER AND LAKE ONTARIO WATER COMPANY, Respondent,
v. THE CITY OF ROCHESTER, Appellant.

(Submitted November 9, 1903; decided November 17, 1903.)

Motion for reargument denied, with ten dollars costs. (See 176 N. Y. 36.)

A. B. FARQUHAR COMPANY, LIMITED, Respondent, v. MONROE
TRUESDELL, Appellant.

(Submitted November 9, 1903; decided November 17, 1903.)

Motion for reargument denied, with ten dollars costs. (See 176 N. Y. 547.)

JAMES A. O'BRIEN, as Administrator of the Estate of THOMAS J. O'BRIEN, Deceased, Appellant, *v.* THE SUPREME COUNCIL CATHOLIC BENEVOLENT LEGION, Respondent.

O'Brien v. Supreme Council C. B. L., 81 App. Div. 1, affirmed.
(Argued October 29, 1903; decided November 17, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered in favor of defendant April 8, 1903, upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

Rufus C. Maltby for appellant.

John C. McGuire for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, MARTIN and WERNER, JJ. Dissenting: HAIGHT and CULLEN, JJ.

In the Matter of the Accounting of D. McLEOD GAWNE, as Surviving Executor of ELLEN O'REILLY, Deceased.

EDWARD A. REILLY, Appellant; MARY E. REILLY, Respondent.

Matter of Gawne, 82 App. Div. 374, affirmed.
(Argued October 28, 1903; decided November 17, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 24, 1903, which reversed a decree of the Kings County Surrogate's Court construing the will of Ellen O'Reilly, deceased, and settling the accounts of D. McLeod Gawne, as surviving executor thereunder.

Henry A. Forster for appellant.

Albert R. Moore for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, CH. J., GRAY, HAIGHT, MARTIN, CULLEN and WERNER, JJ.

O'BRIEN, J. (dissenting). This proceeding was for a judicial settlement and accounting of the executor of the will of Ellen O'Reilly, who died in July, 1900, leaving a will. The only question involved is the meaning and construction to be given to the third clause of the will. All the estate was bequeathed to the executors, in trust, to pay the income of her husband during his life and then disposed of by the third clause, as follows:

"*Third.* It is my will, and I hereby direct that upon the death of my said husband, James O'Reilly, my surviving executor shall divide the principal sum of my estate among my sons, James T. Reilly, William F. Reilly, Edward A. Reilly, and my adopted sons, William O'Reilly and Franklyn O'Reilly, children of Franklyn Fletcher, and legally adopted by my husband and myself in manner following, that is to say: to my son James T. Reilly, one equal one-fifth part; to my son William F. Reilly, one equal one-fifth part in trust for his wife Sarah A. Reilly; to my son Edward A. Reilly, one equal one-fifth part in trust for his wife Mary E. Reilly; to my adopted son William O'Reilly, one equal one-fifth part, and to my adopted son Franklyn O'Reilly, one equal one-fifth part."

This appeal involves only the share of the son Edward A. Reilly, and the question is whether it should be distributed to him as legatee absolutely or to his wife. The surrogate held that he was entitled to it as legatee absolutely under the will, but the learned Appellate Division reversed the decree and awarded the share to the wife, and the husband appeals.

If the clause of the will in question creates a trust in the husband in favor of the wife that the courts are competent to enforce, then the husband would take the share as trustee and not the wife as legatee. If, on the other hand, there was no trust, but an absolute gift of the remainder, the question is, to whom was the gift made by the terms of the will, whether the husband or the wife. There are no words of absolute gift to the wife, but there are words of absolute gift to the hus-

band. The testatrix directed that the remainder be "*divided among my sons*," naming the contestant as one of them, there being five in all. She directed that one equal one-fifth part be divided to the son Edward A. Reilly in trust for his wife, and it is said that these latter words destroy the absolute character of the gift to the husband and convert it into an absolute gift to the wife. If I understand a recent decision of this court there was a good trust in this case created in the husband for the benefit of the wife. (*Collister v. Fassitt*, 163 N. Y. 281.) I am unable to perceive any distinction between that case and the one at bar. In the present case the language, which is added to words of absolute gift, is much clearer and more satisfactory than in the case cited, and if there is a trust the share should go to the husband as trustee and not to the wife as a beneficiary of a void trust. Section 73 of the Real Property Law, in regard to certain trusts of real property, has no application to trusts of personal property. (*Holmes v. Mead*, 52 N. Y. 332; *Matter of Carpenter*, 131 N. Y. 86.)

In my opinion, this clause of the will should be construed as an absolute bequest of one-fifth of the remainder to the husband, and so the surrogate held. The case is one in which there are clear words of absolute gift to the husband, and their legal effect is not changed by the subsequent words in regard to a trust, which have no legal force or effect, since it is admitted that they create no trust or estate whatever, and the clause must, therefore, be construed in the same way as if these words were not used at all. It is the case of an absolute gift, followed by qualifying, directory or precatory words, which are wholly ineffectual in law, and in this state have always been rejected in the construction of wills. A brief reference to some of the cases will show how consistently the rule has been followed in this state. In *Foose v. Whitmore* (82 N. Y. 405) the provision of the will was: "I * * * give and bequeath all my property, real and personal, to my beloved wife, Mary, only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good." It was held that the gift to the wife was absolute, that the

concluding words amounted to a mere suggestion and did not create a trust or any charge upon the estate. In *Clarke v. Leupp* (88 N. Y. 228) the testator declared that he deemed it his duty to make a will for the benefit and protection of his wife and two children, and then proceeded as follows: "I do, therefore, make this my last will and testament, giving and bequeathing to my wife Caroline all my property, real and personal, * * * and do appoint my wife * * * my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named." It was held that the wife took an absolute title to all of the testator's estate; that it was not intended by the words succeeding to limit or cut down the absolute gift and that there was no trust created. In *Lawrence v. Cooke* (104 N. Y. 632), after a gift of the residuary estate to the testator's daughter and her heirs and assigns forever, the following words were added: "I commit my granddaughter * * * to the charge and guardianship of my daughter. * * * I enjoin upon her to make such provision for said grandchild out of my residuary estate * * * in such manner at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and christian duty shall dictate." It was held that no trust was created, nor any charge upon the property given by the will to the daughter; that the legatee took an absolute gift and the provision made for the granddaughter was left wholly to her discretion as to the amount and manner, as well as the time it should be made, and that this discretion could not be interfered with by the court. In *Matter of Gardner* (140 N. Y. 122) the testator gave his residuary estate to his wife to have and to hold the same to her and her assigns forever, provided, however, that if any part of it should remain unexpended or undisposed of at her death, this he gave to his son, his heirs and assigns. He then stated that it was his desire that his wife should not dispose of any of the estate by will in such way that what might remain at her death would go out of his own family and blood relations. The testator had

one child, a son by a former wife. The widow died leaving a will which disposed of so much of the residuary estate as remained at her death, giving a large portion thereof to the son and also one-fourth of her residuary estate after the expiration of a life estate therein of another fourth to a sister of her husband. It was held that the estate of the wife was not limited or qualified by the concluding paragraph, expressing the testator's expectation and desire. In *Clay v. Wood* (153 N. Y. 134) the testator gave certain real and personal property to his wife to have and to hold unto her and her heirs, executors, administrators and assigns forever, with legacies to others, which were declared not to be a charge upon the property given to the wife. He then gave all the residue of the estate to the wife and to her heirs, executors, administrators and assigns forever, followed by these words: "And it is my request that my said wife do sustain, provide for and educate Lucretia, the daughter of my said adopted daughter Josephine. And it is my further desire and request that my wife do make the said Lucretia, Josephine and my nephews and nieces, the children of my brothers C. and G., joint heirs after her death in the said estate which by this will I have bequeathed to my said wife." It was held that the testator intended an absolute gift to the wife, except the legacies to others, with an absolute right of disposition, and that such gift was not qualified by the subsequent precatory clause, and that, hence, no trust or power in trust in favor of the persons mentioned in that clause was created thereby.

In the case at bar the words in regard to a trust, following words of absolute gift to the husband, amount to no more than the expression of a desire, or a wish, on the part of the testatrix that the gift was to be enjoyed by the wife as well as the husband. It is a familiar rule that a will should be construed, whenever possible, in such a way as to vest the estate in the testator's children, or in persons of his own blood. Applying that rule and the other considerations referred to above to this case, it is difficult to conclude that the intention of the testatrix was to pass over the claims of one of her own children, leaving him nothing whatever, and to vest one-fifth

of the estate in his wife, who was not of her own blood. The more reasonable construction is that the mother intended, as her words fairly imply, to make an absolute gift to her son, in which the wife should be recognized or benefited. No trust having been created in her favor, the words used in that respect must be regarded as ineffectual and precatory, having no force or effect in the disposition of the remainder.

I think the order of the Appellate Division should be reversed and the decree of the surrogate affirmed, with costs to both parties to this appeal payable out of the estate.

In the Matter of the Application of the **GEORGE B. WRAY DRUG COMPANY** for Voluntary Dissolution.

BENJAMIN S. COMSTOCK et al., Appellants; **HENRY R. HICKS**, as Receiver, Respondent.

Matter of Wray Drug Co., 88 App. Div. 634, affirmed.
(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1903, which affirmed an order of Special Term denying a motion to vacate and set aside an order dissolving the George B. Wray Drug Company.

Waldo G. Morse for appellants.

Ralph Earl Prime, Jr., for respondent.

Order affirmed, with costs; no opinion.

CONCUR: **PARKER**, Ch. J., **O'BRIEN**, **BARTLETT**, **HAIGHT**, **VANN**, **CULLEN** and **WERNER**, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. **WILLIAM H. STEERS**, Appellant, v. THE DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Respondent.

People ex rel. Steers v. Department of Health, 86 App. Div. 521, affirmed.
(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

July 30, 1903, which affirmed an order of Special Term dismissing an alternative writ of mandamus requiring the defendant to show cause why the relator should not be restored to the position of sanitary inspector in the department of health of the city of New York.

George W. McKenzie and *George P. Beebe* for appellant.

George L. Rives, Corporation Counsel (*James McKeen* of counsel), for respondent.

Order affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

In the Matter of the Accounting of WILLIAM S. HOLMES, as
Executor of MARY E. HOLMES, Deceased, Appellant.

JOHN D. GUTCHES et al., Respondents.

Matter of Holmes, 79 App. Div. 264, affirmed.

(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 29, 1903, which affirmed a decree of the Chenango County Surrogate's Court settling the accounts of William S. Holmes, as executor of Mary E. Holmes, deceased.

Edmund B. Jenks for appellant.

Nelson P. Bonney and *E. E. Mellon* for respondents.

Order affirmed, with costs ; no opinion.

Concur : O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ. Absent : PARKER, Ch. J.

In the Matter of the Judicial Settlement of the Estate of
MARY E. HOLMES, Deceased.

WILLIAM S. HOLMES, Appellant; JOHN D. GUTCHES et al.,
Respondents.

Matter of Holmes, 79 App. Div. 267, affirmed.

(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 29, 1903, which affirmed an order of the Chenango County Surrogate's Court adjudging the appellant herein guilty of contempt of court.

Edmund B. Jenks for appellant.

Nelson P. Bonney and *E. E. Mellon* for respondents.

Order affirmed, with costs; no opinion.

CONCUR: O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and
WERNER, JJ. Absent: PARKER, Ch. J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE A.
GRESS, Appellant, v. GEORGE HILLIARD, as Special Deputy
Commissioner of Excise, et al., Respondents.

People ex rel. Gress v. Hilliard, 85 App. Div. 507, affirmed.

(Argued November 9, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 16, 1903, which affirmed an order of Special Term dismissing a writ of certiorari to review the action of the defendant, special deputy commissioner of excise, in refusing to issue a liquor tax certificate to the relator.

Frederic E. Perham, for appellant.

Herbert H. Kellogg for respondents.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J.; O'BRIEN, BARTLETT, HAIGHT,
VANN, CULLEN and WERNER, JJ.

SOLOMON C. BROTT et al., Plaintiffs, v. ALICE I. DAVIDSON
et al., Respondents.

MICHAEL F. O'CONNOR, Appellant.

Brott v. Davidson, 87 App. Div. 29, appeal dismissed.
(Submitted November 10, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 21, 1903, which affirmed an order of Special Term directing the appellant herein to pay to the respondents a sum of money received by said appellant while acting as attorney for plaintiffs in an action to foreclose a mortgage.

H. D. Bailey for appellant.

J. W. Atkinson for respondents.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, Ch. J.; O'BRIEN, BARTLETT, HAIGHT,
VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN C.
MCGEE, Appellant, v. JOHN N. PARTRIDGE, as Police Com-
missioner of the City of New York, Respondent.

People ex rel. McGee v. Partridge, 84 App. Div. 641, affirmed.
(Argued November 10, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 24, 1903, which affirmed the proceedings of the defendant in dismissing the relator from the police force of the city of New York.

Hyacinthe Ringrose for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly*
and *Terence Farley* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., HAIGHT, CULLEN and WERNER,
JJ. Dissenting: O'BRIEN, BARTLETT and VANN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WALTER G. HARRIS, Appellant, v. DUDLEY GILL, as Sheriff of Warren County, Defendant.

MINERVA SCOVILLE, as Administratrix of the Estate of GEORGE R. SCOVILLE, Deceased, Respondent.

People ex rel. Harris v. Gill, 85 App. Div. 192, affirmed.
(Submitted November 10, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 6, 1903, which reversed an order of the Warren County Court discharging the relator from the custody of the defendant and remanded said relator to custody.

T. D. Trumbull, Jr., for appellant.

Erschine C. Rogers for respondent.

Order affirmed ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES F. WILLIAMS, Appellant, v. JOHN T. McDONOUGH, as Secretary of State, et al., Constituting the PRINTING BOARD OF THE STATE OF NEW YORK, et al., Respondents.

People ex rel. Williams v. McDonough, 85 App. Div. 162, affirmed.
Argued November 10, 1903; decided November 24, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 1, 1903, which confirmed the determination of the State Printing Board in awarding a contract for department printing to the defendant Albany Evening Union Company.

Lewis E. Carr for appellant.

J. Newton Fiero for respondents.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

In the Matter of ANNA W. FERRIS, an Incompetent Person.
GEORGE B. MEAD, JR., as Executor of ANNA W. FERRIS,
Deceased, Appellant.

Matter of Ferris, 86 App. Div. 559, affirmed.

(Argued November 10, 1903; decided November 24, 1903.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered August 1, 1903, which affirmed an order of Special Term substituting the appellant herein in place of Anna W. Ferris, deceased, in a proceeding for the appointment of a committee of said Anna W. Ferris and reviving and continuing the proceeding.

The following question was certified: "Had the Supreme Court jurisdiction to make the order dated the 31st day of March, 1903, and each and every part thereof?"

George H. Fletcher for appellant.

Milton A. Fowler and *Irving Washburn* for respondent.

Order affirmed, with costs, and question certified answered in the affirmative; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

AUGUSTA STEVENS, as Administratrix of the Estate of JOHN STEVENS, Deceased, Respondent, v. UNION RAILWAY COMPANY OF NEW YORK CITY, Appellant.

Stevens v. Union Railway Co., 75 App. Div. 602, affirmed.

(Argued October 23, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 1, 1902, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown and Henry A. Robinson for appellant.

Thomas J. O'Neill and Cornelius J. Early for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HAIGHT, MARTIN, VANN and WERNER, JJ. Dis-
senting: PARKER, Ch. J., GRAY and CULLEN, JJ.

In the Matter of the Accounting of JOHN A. MERRITT, as
Executor of WILLIAM W. WHITMORE, Deceased.

HENRY WHITMORE, Appellant; HERBERT W. WELD et al.,
Respondents.

Matter of Merritt, 86 App. Div. 179, affirmed.

(Submitted November 11, 1903; decided December 1, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the fourth judicial department, made July
7, 1903, which modified and affirmed as modified a decree of
the Niagara County Surrogate's Court settling the accounts of
John A. Merritt as executor and directing the distribution
of the estate of William W. Whitmore, deceased.

Washington H. Ransom for appellant.

S. Wallace Dempsey for respondents.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WALTER M.
LEAZENBEE, Appellant, v. JOHN N. PARTRIDGE, as Police
Commissioner of the City of New York, Respondent.

People ex rel. Leazenbee v. Partridge, 83 App. Div. 643, affirmed.

(Argued November 11, 1903; decided December 1, 1903.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the first judicial department, entered May

28, 1903, which affirmed a determination of the defendant dismissing relator from the police force of the city of New York.

Louis J. Grant for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly and John W. Hutchinson, Jr., of counsel), for respondent.

Order affirmed, with costs ; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

CHARLES W. ECKERSON, Appellant, v. THE CITY OF NEW YORK, Respondent.

Eckerson v. City of New York, 80 App. Div. 12, affirmed.
(Argued November 11, 1903; decided December 1, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 11, 1903, reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and granting a new trial.

George F. Langbein and William J. Walsh for appellant.

George L. Rives, Corporation Counsel (Theodore Connolly and Edward J. McGuire of counsel), for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

FREDERICK A. LYONS, Appellant, v. THE CITY OF NEW YORK, Respondent.

Lyons v. City of New York, 82 App. Div. 306, affirmed.
(Argued November 11, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 14, 1903, affirming a judgment in favor of defendant entered

upon a dismissal of the complaint by the court at a Trial Term without a jury.

Franklin Pierce for appellant.

George L. Rives, Corporation Counsel (*Theodore Connolly* and *W. B. Crowell* of counsel), for respondent.

Judgment affirmed, with costs, on the sole ground that the salary was not increased; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

EDWARD WAGNER, by his Guardian ad Litem, LOUIS EHRHARDT, Respondent, *v.* METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Wagner v. Metropolitan Street Ry. Co., 79 App. Div. 591, affirmed.
(Argued November 12, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Charles F. Brown, Arthur Ofner and Henry A. Robinson for appellant.

Henry A. Powell for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

JAMES A. SANDLES, by his Guardian ad Litem, JOHN SANDLES, Appellant, *v.* MORRIS LEVENSON, Respondent.

Sandles v. Levenson, 78 App. Div. 306, affirmed.
(Argued November 12, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1903, affirming a judgment in favor of defend-

ant entered upon a dismissal of the complaint by the court at Trial Term.

Herbert C. Smyth, Sumner B. Stiles and Eugene F. Seymour for appellant.

Moses Feltenstein for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., HAIGHT, VANN and WERNER, JJ.
Dissenting : O'BRIEN, BARTLETT and CULLEN, JJ.

EVA DICKESCHEID, as Administratrix of the Estate of GEORGE J. DICKESCHEID, Deceased, Appellant, v. JOHN F. BETZ, Respondent.

Dickescheid v. Betz, 80 App. Div. 8, affirmed.
(Argued November 12, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Theodore H. Lord and Ambrose F. McCabe for appellant.

Abram I. Elkus, James C. McEachen and Carlisle J. Gleason for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : BARTLETT, HAIGHT, CULLEN and WERNER, JJ.
Dissenting : PARKER, Ch. J., and O'BRIEN, J. Not voting : VANN, J.

GEORGE EDWIN JOSEPH, as Trustee in Bankruptcy of THE MUTUAL MERCANTILE AGENCY, Appellant, v. NORMAN C. RAFF, Respondent.

Joseph v. Raff, 82 App. Div. 47, affirmed.
(Argued November 16, 1903; decided December 1, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 18, 1903, reversing a judgment in favor of plaintiff entered

upon a decision of the court on trial at Special Term and granting a new trial.

Judson S. Landon, George Edwin Joseph, William L. Cahn and Wilson B. Brice for appellant.

William B. Ellison, Walter L. McCorkle and Arnold L. Davis for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs; no opinion.

Concur: GRAY, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

NATHAN LEVY, as Trustee in Bankruptcy of THE PROSPECT PARK BREWERY, Respondent, *v.* PETER HUWER, Appellant.

Levy v. Huwer, 80 App. Div. 499, affirmed.

(Argued November 16, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 1, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Herbert T. Ketcham and Joseph E. Owens for appellant.

Charles De Hart Brower and Edward H. Harrison for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ. Absent: PARKER, Ch. J.

In the Matter of the Probate of the Will of MARY STEINER PUTNAM, Deceased.

JOHN R. PUTNAM, Appellant; CHARLES H. STURGES et al., Respondents.

Matter of Putnam, 75 App. Div. 615, affirmed.

(Submitted November 17, 1903; decided December 1, 1903.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July

17, 1902, which affirmed a decree of the Saratoga County Surrogate's Court admitting to probate the will of Mary Steiner Putnam, deceased.

Edgar T. Brackett, A. Pennington Whitehead and Nash Rockwood for appellant.

Charles H. Sturges for respondents.

Order affirmed, with costs; no opinion.

Concur: GRAY, BARTLETT, HAIGHT, CULLEN and WERNER, JJ. Not voting: PARKER, Ch. J., and VANN, J.

ROBERT BOYD, Appellant, v. THE NEW YORK SECURITY and TRUST COMPANY, Defendant, and LIZZIE H. DAILY, as Executrix of HENRY DAILY, JR., Deceased, Respondent.

Boyd v. Daily, 85 App. Div. 581, affirmed.

(Argued November 17, 1903; decided December 1, 1903.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 4, 1903, modifying and affirming as modified a judgment in favor of respondent herein entered upon a decision of the court on trial at Special Term.

Edward W. S. Johnston for appellant.

Lyman E. Warren for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ.

THE TWELFTH WARD BANK OF THE CITY OF NEW YORK, Respondent, v. FREDERICK H. SCHAUFFLER, as Trustee of ANTONIO RASINES, a Bankrupt, Appellant, and PEDRO ANTONIO RASINES et al., as Executors of AMELIA F. RASINES, Deceased, Respondents.

(Submitted November 23, 1903; decided December 1, 1903.)

MOTION to amend remittitur. (See 176 N. Y. 593.)

Motion granted and remittitur amended by giving costs to the Twelfth Ward Bank, the plaintiff, and without costs to either of the other parties.

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ABATEMENT AND REVIVAL.

Continuance of action in state court against receivers appointed by federal court after their discharge.

See PRACTICE, 1, 2.

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APPEAL.

1. *Reversal.* Rulings upon a trial, even if erroneous, unless of sufficient importance, will not justify the reversal of a judgment. *Adams v. Elwood.* 106

2. *Objection.* An objection to evidence upon which a ruling is reserved, but not made, must be treated as though it had been sustained and an exception taken. *Id.*

3. *Modification of Judgment.* Where, in an action to foreclose a mechanic's lien, a judgment has been entered which does not give to a claim the priority over all the other claims to which it is entitled, but places it last in the order of payment, and the claimant appeals, perfecting his appeal as to some of the parties, but not as to the others, the judgment should be modified, where it can be done without doing injustice to any of the parties, by giving the claimant priority over those claimants against whom he perfected the appeal. *Hall v. City of New York.* 293

4. *Power of Appellate Division to Reverse or Affirm Wholly or Partly—Code Civ. Pro. § 1817.* Where a judgment rendered in an action at law or in equity consists of distinct parts so separate and independent in form and nature as to be easily severed and each is in fact a distinct adjudication, the Appellate Division, in the exercise of a sound discretion, may upon appeal affirm the adjudication not affected by error and reverse the adjudication which is affected by error and grant a new trial as to that portion of the issues only, the application of the rule depending upon the form and nature of the judgment rendered rather than upon the forum of the action. *City of Buffalo v. Delaware, L. & W. R. R. Co.* 308

5. *Briefs of Counsel Should Contain a Fair Statement of Facts.* A fair statement of the facts is essential to a proper presentation of an appeal. An unfair statement is certain to be discovered and when discovered affects the force of the entire brief. When the facts are not open to review they should be stated as found, or as presumed to have been found. When the facts are to be reviewed it is proper for counsel to

APPEAL—*Continued.*

state them as he claims they should have been found in accordance with the weight of evidence, citing the folios where the evidence appears in the record, but on the crucial points he should also state the testimony opposed to his theory, so that the court may have before it a faithful picture of the whole case. A failure to observe these rules increases the labor of the court and reflects upon the integrity of the brief. *People v. White*. 331

6. *When Appellate Court May Make Order Directing Trial by Jury of Questions of Fact.* Under section 2588 of the Code of Civil Procedure an appellate court must "make an order directing the trial by a jury of the material questions of fact arising upon the issues between the parties," where its reversal or modification of a decree is founded upon a question of fact, and it may do it in any other case where, in its opinion, it would seem that the ends of justice might be best promoted by such a course. *Matter of Hopkins*, 595.

When alleged error in charge on trial for murder cannot be reviewed without an exception thereto.

See CRIMES, 11.

When judgment convicting defendant of murder will not be reversed in the absence of exceptions.

See CRIMES, 13.

APPELLATE DIVISION.

Power of, to reverse or affirm wholly or partly.

See APPEAL, 4.

Return to certiorari to review determination of town board made by majority of board is conclusive upon.

See CERTIORARI.

ASSESSMENTS.

For local improvements—validity of provisions of city charter restricting actions to annul.

See LIMITATION OF ACTIONS.

Effect of assessment made while proceeding for condemnation of property by city is pending.

See TAX, 1.

ASSIGNMENT.

1. *Election of Remedies.* Whether or not there has been an election of remedies is determined by the commencement, not by the result of an action. *Matter of Garver*. 386

2. *Assignment for Creditors—Res Adjudicata.* The commencement of an action by a judgment-creditor to set aside an assignment for the benefit of creditors on the ground of fraud does not constitute an election by him to take in hostility to the assignment within the doctrine of the election of remedies; and although he is successful as to a portion of the property transferred to the assignee, if the judgment results in no benefit to him, he may take under the assignment notwithstanding his attack upon it, and the judgment constitutes no bar to such relief. *Id.*

ASSOCIATIONS.

1. *Benefit Association—Unreasonable By-Laws Cannot Deprive Members of their Rights.* By-laws of a mutual benefit association, in so far as they attempt to make the default or misconduct of its own agent and officer in failing to pay over moneys received for dues and assessments the default and misconduct of the members, who pay them precisely as directed therein

ASSOCIATIONS — Continued.

and on account of such default deprive them of their rights as members, including a forfeiture of their insurance, are unreasonable and void, and have no effect upon the status of members in good standing. *Matter of Brown v. Order of Foresters.* 132

2. *Same.* The fact that in such a case, if a suspended member is denied reinstatement, the constitution and by-laws provide that he may appeal to various courts or tribunals within the association, and that no member shall be entitled to bring any civil action or legal proceeding until he shall have exhausted all the remedies by such appeals, does not debar him from any remedy or relief in the courts of this state, in a case where the obstacles to the prosecution of an appeal amount to almost a denial of justice, and where, if prosecuted, no relief would result therefrom. *Id.*

BANKING.

When payment of deposit to foreign administrator after appointment of administrator in this state discharges debt.

See EXECUTORS AND ADMINISTRATORS.

BANKRUPTCY.

Discharge in, Not a Defense, or Bar, to Action for Embezzlement and Misappropriation of Funds — Demurrer to Answer Setting up Same as a Defense. Where the complaint in an action of conversion alleges that the defendant did wrongfully and fraudulently embezzle and misappropriate plaintiff's money, the legal import thereof is that defendant became possessed of the money in a fiduciary capacity, and, hence, his liability thereunder is a liability expressly excepted, by section 17 of the Bankruptcy Law of 1898, from debts released by a discharge in bankruptcy, and defendant's answer setting up his discharge in bankruptcy as a defense, or bar, to the action is demurrable as insufficient in law upon the face thereof. *Watertown Carriage Co. v. Hall.* 813

BENEFIT ASSOCIATIONS.

Unreasonable by-laws cannot deprive members of their rights.

See ASSOCIATIONS, 1, 2.

BILLS, NOTES AND CHECKS.

Check drawn by guardian notice to payee that fund belongs to ward.

See GUARDIAN AND WARD.

BOND.

Impairment of indemnitor's rights.

See PRINCIPAL AND SURETY.

BRIEFS.

Of counsel on appeal should contain a fair statement of facts.

See APPEAL, 5.

BUFFALO (CITY OF).

Power of Commissioners under Grade Crossing Acts to Change General Plan. Under the Buffalo Grade Crossing Acts (L. 1888, ch. 345; L. 1890, ch. 255; L. 1892, ch. 353) providing that: 1. The general plan to be adopted may be amended only in matters of detail. 2. It shall not be extended beyond the general plan heretofore adopted under which contracts have been entered into. 3. Contracts heretofore or hereafter made with railroad companies may be changed by agreement between the contracting parties, but not otherwise — where the commissioners in March, 1893, adopted a general plan which provided for no change in the grade of a railroad running through the city as then constructed and operated, they cannot compel the railroad company to change the elevation of its tracks and reconstruct its terminal structures, sidings and switches to

BUFFALO (CITY OF) — *Continued.*

comply with a plan proposed and adopted in 1899, which is an extension of the general plan of 1898, and not a modification, in some details, of that plan. *Lehigh Valley Ry. Co. v. Adam.* 420

BY-LAWS.

Of benefit association — when cannot deprive members of their rights.

See ASSOCIATIONS, 1, 2.

CARE.

Degree of, required in passing excavation in street.

See NEGLIGENCE, 2.

CAUSE OF ACTION.

Action for damages resulting from conspiracy to wreck corporation must be brought by corporation.

See CORPORATIONS, 1.

Action for damages will not lie between members of two firms having one member common to both.

See FALSE REPRESENTATIONS, 1.

CERTIORARI.

Return to Certiorari to Review Determination of Town Board Made by Majority of Board Is Conclusive upon Appellate Division — Separate Return Made by One Member of Board Cannot Be Considered. Where it appears from the papers and proceedings upon a writ of certiorari, issued to review the determination of a town board in disallowing a claim presented thereto, that the only matter in issue was the employment of the relator by the town board of health to render services as a physician to certain smallpox patients during a certain period, and the return made by a majority of the town board specifically denies such employment and distinctly traverses every allegation of the relator's petition in that behalf, such return is conclusive upon the Appellate Division and the writ should be dismissed, notwithstanding one of the town board made a separate return corroborating the petitioner, since there can be but one return to a writ of certiorari, unless a second is directed or permitted by the court because the first is defective or insufficient in form; and where a writ of certiorari is issued to review the determination of a board or body composed of two or more persons the return must be made in the name of the board or body and may be executed by a majority of the members thereof; the return of the majority of the members is, therefore, the only return which the Appellate Division has the right to consider, and the separate return should be disregarded. *People ex rel. Lester v. Eno.* 513

CHAMPERTY.

When Purchase-Money Mortgage not Champertous. Judicial sales are not within the condemnation of the Statute of Champerty (1 R. S. 739, §§ 147, 148; Real Property Law, 1895, ch. 547, § 225); a purchaser of land sold under a decree in a foreclosure action acquires a perfect title, although at the time the premises are in the actual possession of one claiming title thereto under a tax deed; a mortgage executed by him on the same day to the plaintiff to secure a part of the purchase price is not void under the statute since the deed and the mortgage take effect at the same instant, constituting but one act, and the mortgagee, to the extent of his mortgaged interest, whether it be considered a lien or a conditional estate, must be regarded as much a purchaser at the judicial sale as the mortgagor, and acquires the title not from him but through him as a mere conduit; the assignee of such purchase-money mortgage who forecloses it and bids in the premises acquires the title thereto and may maintain an action of ejectment for their recovery. *De Garmo v. Phelps.* 455

CHARGE.

Not deemed erroneous when too lenient toward defendant on trial for murder.

See CRIMES, 4.

Instruction as to presumption of sanity of defendant on trial for murder — trial court not bound to charge request of counsel where substantially the same proposition has already been charged.

See CRIMES, 9-11.

Instruction to jury, on trial for murder.

See CRIMES, 17.

Erroneous refusal to charge.

See NEGLIGENCE, 3.

CHARITIES LAW.

Jurisdiction of New York city magistrate to sentence women to state reformatory under section 146 thereof.

See CRIMES, 24.

CHECKS.

Check drawn by guardian is notice to payee that fund belongs to ward.

See GUARDIAN AND WARD.

CHILDREN.

Unlawful omission to provide medical attendance for a minor child.

See PARENT AND CHILD, 1-5.

CITIES.

When water company, incorporated for the purpose of supplying water to towns and villages adjacent to city, may lay its water mains and pipes through the city.

See WATER WORKS, 1, 6.

CIVIL SERVICE.

New York (City of) — Deputy Tax Commissioner — Office of, Excepted from Provisions of Section 21 of Civil Service Law, Prohibiting Removal of Honorably Discharged Volunteer Firemen Therefrom, Except After Hearing on Stated Charges. The office of deputy tax commissioner of the city of New York is an office excepted, by the language thereof, from the provisions of the Civil Service Law (L. 1899, ch. 370, § 21, as amd. by L. 1902, ch. 270) prohibiting the removal of an honorably discharged soldier or volunteer fireman from any position, by appointment or employment, in the state or any of the cities thereof, except for incompetency or misconduct after a hearing upon stated charges, and, therefore, an honorably discharged volunteer fireman who has been removed by the board of tax commissioners without a trial, having been first given an opportunity of making an explanation, under the provisions of section 1543 of the charter, is not entitled to a hearing upon stated charges, and a writ of certiorari to review his removal will not lie. *People ex rel. Ryan v. Wells.* 462

CODE OF CIVIL PROCEDURE.

1. §§ 340, 348 — *County Courts — Jurisdiction of, over Counterclaims Exceeding \$2,000 in Amount.* While the jurisdiction of County Courts in actions for the recovery of money only is limited by section 14 of article VI of the Constitution and section 340 of the Code of Civil Procedure to actions in which the complaint demands judgment for a sum not exceeding \$2,000, such limitation is based wholly on the demand of the complaint, and, after jurisdiction of a cause of action has once been acquired, a County Court has, under section 348 of the Code of Civil Procedure, "the same jurisdiction, power and authority in and over the same and in the course of the proceedings therein, which the Supreme Court possesses in

CODE OF CIVIL PROCEDURE — Continued.

a like case; and it may render any judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case;" and so the general jurisdiction to entertain common-law actions, where the demand for judgment in the complaint does not exceed \$2,000, carries with it the power to try and render any judgment upon any counter-claim irrespective of the amount that the defendant may plead in his answer to the cause of action stated in the complaint. *Howard Iron Works v. Buffalo Elevating Co.* 1

2. § 405 — *Mechanic's Lien — Action to Foreclose Lien — When Action Commenced Within One Year After Filing Lien Is Dismissed for Lack of Evidence a New Action May Be Commenced Within One Year After Final Determination of First Action.* Where a mechanic's lien was filed January 24, 1889, and an action to foreclose the lien, duly commenced February 15, 1889, was dismissed "on the merits," for failure to furnish an architect's certificate of performance of the work, by a judgment entered August 4, 1899, and, on appeal, the Appellate Division, on March 9, 1900, modified the judgment by striking therefrom the words "on the merits," and affirmed it as modified, a new action to foreclose the lien, commenced March 15, 1900, is not barred by the provision of the Lien Law, that a lien shall not continue for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, since the statute does not in express terms prohibit an action to foreclose a lien unless that action be commenced within one year, but enacts that the lien shall cease unless an action be brought thereon within one year, the first action was commenced within that time, and, therefore, the cause of action is saved by the statute (Code Civ. Pro, § 405), which provides that if an action be commenced within the time limited therefor, and be terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or termination. *Conolly v. Hyams.* 403

3. § 439 — *Failure to Legally Serve Non-resident Devisee with Process Fatal to Judgment.* A devisee under a will of real estate directed to be sold, having an interest therein subject to the exercise of a power of sale, is a necessary party to an action in equity by a creditor of the estate to establish his claim and compel the sale of such real estate for the payment of debts; and where the devisee who was a non-resident was made a party defendant, but by reason of a non-compliance with section 439 of the Code of Civil Procedure was never legally served with process and did not appear, a judgment in plaintiff's favor must be reversed. *Holly v. Gibbons.* 520

4. § 756 — *Practice — Continuance of Action in State Court against Receivers Appointed by Federal Court after Their Discharge.* An action against railroad receivers appointed by a federal court brought in the Supreme Court of the state of New York under the Revised Statutes of the United States, authorizing the bringing of actions without previous leave of the court against a receiver appointed by a federal court in respect to any act or transaction of his in carrying on the business connected with the property, is not necessarily terminated as to them by their subsequent discharge and the transfer of the property pursuant to a decree of foreclosure and sale made by the federal court, and the plaintiff is not obliged to substitute the purchaser thereunder as defendant before proceeding to judgment; under section 756 of the Code of Civil Procedure, in case of a devolution of liability, the court may substitute the party upon whom the liability is devolved, but when it does not, the action is properly continued against the original parties. *Buer v. McCullough.* 97

CODE OF CIVIL PROCEDURE—Continued.

5. § 968—*Trial—When Question Whether Judgment for Money May Be Recovered Is Dependent upon Decision of Equitable Questions the Issue Is Not Triable by Jury as a Matter of Right.* An action brought by the executors of a decedent demanding judgment that a contract of annuity between decedent and a life insurance company be adjudged void and be canceled and set aside and that the plaintiffs recover from defendant the amount paid by decedent or the annuity with interest thereon less the amount of annuities paid with interest thereon, is an action praying for the relief that only a court of equity can grant, and the plaintiffs are not entitled to a trial by jury as a matter of right, under the provisions of section 968 of the Code of Civil Procedure. *Dykman v. U. S. Life Ins. Co.* 299

6. § 1817—*Appeal—Power of Appellate Division to Reverse or Affirm Wholly or Partly.* Where a judgment rendered in an action at law or in equity consists of distinct parts so separate and independent in form and nature as to be easily severed and each is in fact a distinct adjudication, the Appellate Division, in the exercise of a sound discretion, may upon appeal, under section 1817 of the Code of Civil Procedure, affirm the adjudication not affected by error and reverse the adjudication which is affected by error and grant a new trial as to that portion of the issues only, the application of the rule depending upon the form and nature of the judgment rendered rather than upon the forum of the action. *City of Buffalo v. Delaware, L. & W. R. R. Co.* 308

7. § 2588—*Appeal—When Appellate Court May Make Order Directing Trial by Jury of Questions of Fact.* Under section 2588 of the Code of Civil Procedure an appellate court must "make an order directing the trial by a jury of the material questions of fact arising upon the issues between the parties," where its reversal or modification of a decree is founded upon a question of fact, and it may do it in any other case where, in its opinion, it would seem that the ends of justice might be best promoted by such a course. *Matter of Hopkins.* 595

8. §§ 3251, 3372—*Costs—What Costs May Be Recovered by Landowner Successfully Defending Condemnation Proceeding.* Where the compensation awarded to the owner of real property, by the commissioners in a condemnation proceeding instituted under section 3372 of the Code of Civil Procedure, exceeds the amount offered by the corporation seeking to condemn the property, with interest from the time the offer was made, the landowner is entitled to recover the same amount of costs that a defendant may recover under section 3251 of the Code of Civil Procedure when he has prevailed in an action in the Supreme Court after a trial; ten dollars costs for proceedings before notice of trial and fifteen dollars after notice of trial, with thirty dollars costs for a trial of an issue of fact and ten dollars for a trial occupying more than two days. *Matter of Brooklyn Union Elevated R. R. Co.* 213

CODE OF CRIMINAL PROCEDURE.

1. § 395—*Evidence—Admissibility of Confession Procured by Deception—Credibility of Witness Thereto a Question for the Jury.* Confessions made by one accused of crime may be given in evidence unless made upon a stipulation for freedom from prosecution or under the influence of fear produced by threats. (Code Cr. Pro. § 395.) The fact, therefore, that a confession was procured from a defendant charged with the crime of murder by a deception practiced by an officer in charge of him, which is not sanctioned by the Court of Appeals, does not make it incompetent. Confessions must be corroborated by proof "that the crime charged has been committed," and when so corroborated, the question of the credibility of the witnesses thereto and the circumstances under which the confessions are made are for the consideration of the jury. *People v. White.* 331

2. *Idem—Trial—Instruction to Jury.* Where a confession procured from a defendant, who was imprisoned under a charge of murder, by an

CODE OF CRIMINAL PROCEDURE — Continued.

undersheriff pretending to be his friend and desiring to help him, and other confessions made to fellow-prisoners who were in the charge of the sheriff and subject to his influence, are offered in evidence and it appears that there is evidence to bring all of the confessions within the permission of the statute (Code Cr. Pro. § 395), but none to bring any of them within the prohibition thereof, except the statement of the defendant himself, which was denied by several witnesses, and the confessions are corroborated, one in nearly every particular and the others in several substantial particulars, it is not erroneous to submit to the jury the question of fact whether any of the confessions fell within the prohibition of the statute or of the rules of evidence, where they are instructed to disregard them if they were made under the influence of fear produced by actual or covert threats, or through promises, acts of intimidation or other unlawful means, and unless they were voluntary, fairly obtained and not procured by inquisitorial compulsion or other improper methods. *Id.*

3. § 528 — *Examination of Alleged Error in Charge — When Such Error Cannot Be Reviewed Without an Exception Thereto — Effect of Section 528, Code of Criminal Procedure.* An instruction by the trial court on a trial for murder that it is "not necessary that every circumstance should be proved beyond a reasonable doubt," does not constitute reversible error where it is apparent that the court did not mean that every circumstance constituting a link in the chain of circumstances necessary to establish "the fact of killing by the defendant" need not be proved beyond a reasonable doubt, but that every incidental circumstance, such as those bearing upon the probabilities that the main circumstances were true, or that every fact essential to convict, such as "the death of the person alleged to have been killed," need not be proved beyond a reasonable doubt; moreover, such instruction cannot be reviewed under the statute (Code Crim. Pro. § 528) in the absence of a specific exception thereto, when the court is satisfied that the verdict is right and based upon evidence that is clear and convincing. *People v. Tobin.* 278

4. § 542 — *Crimes — Uxoricide — Evidence of Reputation for Unchastity of Defendant's Alleged Paramour Incompetent upon the Question of Motive.* Upon the trial of an indictment for the murder of a husband or wife specific acts, declarations, conduct and occurrences tending to show improper relations with a person of the opposite sex are competent evidence upon the question of motive; but evidence as to the reputation for unchastity of the alleged paramour is incompetent; its reception constitutes reversible error and is not an error that can be overlooked as technical or unsubstantial under section 542 of the Code of Criminal Procedure. *People v. Montgomery.* 219

5. § 658 — *When Court Is Justified in Refusing to Appoint Commission under the Statute to Examine Defendant and Report as to His Sanity.* Where a trial court, at the request of counsel for a defendant charged with the crime of murder, at the time the indictment was moved for trial, appointed two expert physicians to examine the defendant and report as to his sanity, and adjourned the trial until such report could be made, and the physicians, after making an examination, reported that in their judgment the defendant was sane, in which opinion a third physician, who at one time had charge of defendant, concurred, the court is justified, in the exercise of sound discretion, in denying a motion made in behalf of defendant, based upon the affidavits of his attorneys, for a commission, pursuant to section 658 of the Code of Criminal Procedure, to examine the defendant and report to the court as to his sanity at the time of the examination, where no evidence is presented to controvert the report of the medical experts, who examined the defendant, and to show that he was insane, except the affidavits of his counsel, which contained few facts and consisted mainly of the expression of their own opinions, unsupported by the affidavit of any physician. *People v. Tobin.* 278

COLONIAL LAWS.

1703, *Ch. 131*, 1772, *Ch. 1536* — *Power of Town Officers of Town of Hyde Park Not Restricted or Affected by Section 77 of the County Law, Relating to the Alteration of State Roads.* The power of the town board and highway commissioners of the town of Hyde Park to authorize an alteration and improvement in the New York and Albany post road is not restricted or made dependent upon the consent of the board of supervisors of Dutchess county by the provisions of section 77 of the County Law (L. 1892, ch. 686), providing that the board of supervisors of any county may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state, since it is apparent, from an examination of the Colonial Laws (Col. Laws, 1703, ch. 131; 1772, ch. 1536), and the statutes of the state (L. 1779, ch. 31; L. 1797, ch. 43; L. 1813, ch. 33), relating to the laying out, construction and maintenance of the New York and Albany post road and other public highways established prior to 1813, that under the colonial laws as early as 1772, especially in Dutchess county, where the alteration in question was made, commissioners of highways were empowered to alter highways that were deemed inconvenient, and that this power was continued by the state legislature in 1779 and by general laws in 1797 and 1813, and that the same power has been continued until the present day; it follows, therefore, that at the time of the passage of the County Law and of chapter 317 of the Laws of 1882, and even of chapter 83 of the Laws of 1817, the substance of which statutes is contained in section 77 of the County Law, the commissioners of highways of towns had been given jurisdiction over the existing colonial highways, with the power to make such needed alterations therein as should be deemed necessary, and that power has not been taken from them by the County Law. *People ex rel. Dinsmore v. Vandewater.* 500

COMPROMISE.

Of action for damages against city of New York arising from negligence of contractor — bond to indemnify city — impairment of indemnitor's rights.

See PRINCIPAL AND SURETY.

CONDEMNATION PROCEEDINGS.

What costs may be recovered by landowner successfully defending.

See COSTS.

Condemnation of rights of owners of waters of inland pond and rights of owners of land surrounding the pond and under waters of same — when owner of bed of pond entitled to substantial damages therefor.

See RIPARIAN RIGHTS, 3.

Effect of assessment made while proceeding for condemnation of property is pending.

See TAX, 1.

Appraisal of property of water works company, made by commissioners in condemnation proceedings, illegal and erroneous when based upon invalid contract of purchase.

See WATER WORKS, 8.

CONFESSION.

Of crime procured by deception — admissibility of, in evidence — how competency of, is to be determined.

See CRIMES, 15, 16.

CONSIDERATION.

For grant of easement obtained by fraud — when need not be returned as preliminary to action of ejectment.

See EJECTMENT, 1, 2.

CONSPIRACY.

To wreck corporation — action for resulting damages must be brought by corporation, not by individual stockholder — measure of damages.

See CORPORATIONS, 1.

CONSTITUTIONAL LAW.

1. *Prohibition Against Use of Free Railroad Passes by Public Officers Applies to Palace and Sleeping Car Passes* — Const. Art. XIII, § 5. A public officer, who accepts the privilege of riding in a palace or sleeping car accorded to him by a free pass, accepts a free pass and free transportation within the meaning of section 5 of article XIII of the Constitution prohibiting the use by a public officer of free transportation. *People v. Wadhams*. 9

2. *Witness in Any Criminal Case Not Compelled to Give Any Evidence Against Himself — When Determination Whether or Not Answer Will Incriminate Him Rests with Witness* — Const. Art. 1, Sec. 6. Under section six of article one of the State Constitution, providing that no person "shall be compelled in any criminal case to be a witness against himself," he is not obliged to answer questions in any criminal case, either against himself or another party, when he states that his answers might tend to incriminate him; he is protected from being compelled to disclose the circumstances of his offense or the sources from which, or the means by which, evidence of its commission, or his connection with it, may be obtained or made effectual for his conviction, without using his answers as direct admissions against him; and except where the court can see that his refusal to answer is clearly a fraudulent device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, he is his own judge as to whether or not he will answer. *People ex rel. Lewisohn v. O'Brien*. 253

3. *Privilege of Witness Provided for by Section 342 of the Penal Code Not Coextensive with That Afforded by Constitutional Provision*. Section 342 of the Penal Code, providing that "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding," is not coextensive with the constitutional provision and does not afford the witness the protection contemplated thereby, in that it does not prevent the use of evidence against him which may be obtained through his testimony, but simply excludes such testimony. *Id.*

4. *Same*. A witness produced by the prosecution before a magistrate on an information charging the defendant with keeping a gambling house may properly refuse to answer questions as to whether he had ever been in the place in question, upon the ground that his answers might tend to incriminate him, since the statute does not afford him the full protection accorded by the constitutional provision. *Id.*

Personal rights — when admission in evidence of private papers not violative of constitutional guaranty against compelling a prisoner to be a witness against himself — constitutionality of sections 344a and 344b of Penal Code in relation to policy gambling — constitutionality of Indeterminate Sentence Law.

See CRIMES, 18-22.

Validity of provisions of charter of city prohibiting maintenance of actions to set aside or annul assessments for local improvements unless commenced within prescribed time and in compliance with prescribed conditions.

See LIMITATION OF ACTIONS.

CONSTITUTIONAL LAW — *Continued.*

Constitutional guaranty of freedom of worship not violated by statutory requirement that medical attendance be furnished to minor child.

See PARENT AND CHILD, 5.

Section 220 of Tax Law, imposing transfer tax upon the exercise of a power of appointment, constitutional — construction of statute.

See TAX, 4, 5.

Invalidity of resolution of board of supervisors attempting to extend term of town officers.

See TOWNS.

CONTRACT.

New York City — Street Improvement — When City Not Liable for Damages Caused by Mistakes of City Surveyor in Fixing Grades. Under a street improvement contract executed by the commissioner of public works of the city of New York pursuant to an ordinance directing the regulating and grading of an avenue, which contract provided that "a city surveyor will be employed by the parties of the first part to see that the work is completed in conformity to the profile and to ascertain and certify the quantity of work done. Said surveyor, at the request of the contractor, will be directed to designate and fix grades for his guidance during the progress of the work without charge, provided that the said parties of the first part shall not be liable for any delay or for any errors of said surveyor in giving such grades and said surveyor shall be considered as the agent of the contractor so far as giving such grades is concerned and not the agent of the city of New York," to which contract a profile was attached — the contractor is not entitled to recover for losses suffered in the grading of the avenue by reason of the mistakes of the city surveyor in grades given by him although the contractor did not request that the grades be furnished him, and upon discovering the mistakes notified the superintendent of street improvement of them and proceeded only after his positive direction to conform the avenue to the grades given, for the reason that the duty of the contractor was to follow no grade except such as was in accordance with the profile, and the direction of such officer was a material modification of this requirement which he had no power to make in the absence of an express authorization by the proper authorities; and, therefore, the contractor proceeded at his peril to obey such direction, and in not relying upon the profile alone. *Becker v. City of New York.* 441

Of title insurance — reformation of policy.

See INSURANCE, 1-3.

Of life insurance — restriction of power of agents to waive conditions.

See INSURANCE, 4-6.

Provisions in specifications for construction of new East River Bridge limiting competition neither illegal nor fraudulent — insertion of invalid provisions of Labor Law does not render contract void.

See NEW YORK (CITY OF), 6, 7.

For public work in city of New York — bond to indemnify city from claims for damages arising from negligence of contractor — impairment of indemnitor's rights.

See PRINCIPAL AND SURETY.

By one of several joint debtors under judgment in tort to pay part thereof in consideration of his release therefrom — when such joint debtor will not be relieved from contract because of similar contract made with other joint debtors.

See SUBROGATION, 1-3.

CONTRACT — Continued.

Of annuity — action to set aside.

See TRIAL, 3.

By village to purchase property of water works company — when invalid.

See WATER WORKS, 7, 8.

CONVERSION.

When discharge in bankruptcy not a defense to action for.

See BANKRUPTCY.

CORPORATIONS.

Action for Damages Resulting from Conspiracy to Wreck Corporation Must Be Brought by Corporation, Not by an Individual Stockholder — Protection of Interests of Minority Stockholders — Measure of Damages. The damages, resulting from an alleged conspiracy entered into by the majority stockholders of a corporation to wreck it, by refusing, through officers under their control, to accept business, so that it would be unable to pay the interest upon its funded debt, and a foreclosure would result by which creditors and the minority stockholders would be deprived of their interest in the property, belong to the corporation, not to the individual stockholders, and the latter, as such, cannot maintain an action for their recovery. Such an action must be brought by the corporation or its receiver or by any stockholder after proper demand, in behalf of the corporation and for its benefit, in order that the interest of creditors may be protected and that they may be paid out of any recovery. Assuming that the directors of the corporation in such a case would be controlled by the defendants and would work against the interests of the minority stockholders, the Supreme Court has ample power to protect such interests, and the remedy would be adequate, since the measure of damages in such an action would be the full value of the property and franchises of the corporation as it existed prior to the overt acts producing insolvency, less that which the property actually brought upon the foreclosure sale. *Niles v. N. Y. C. & H. R. R. Co.* 119

Foreign insurance corporation — franchise tax upon.

See TAX, 6.

Water works companies — right of, to lay water mains through city.

See WATER WORKS, 1-6.

COSTS.

What Costs May Be Recovered by Landowner Successfully Defending Condemnation Proceeding Instituted under Section 3372 of Code of Civil Procedure. Where the compensation awarded to the owner of real property, by the commissioners in a condemnation proceeding instituted under section 3372 of the Code of Civil Procedure, exceeds the amount offered by the corporation seeking to condemn the property, with interest from the time the offer was made, the landowner is entitled to recover the same amount of costs that a defendant may recover under section 3251 of the Code of Civil Procedure when he has prevailed in an action in the Supreme Court after a trial; ten dollars costs for proceedings before notice of trial and fifteen dollars after notice of trial, with thirty dollars costs for a trial of an issue of fact and ten dollars for a trial occupying more than two days. *Matter of Brooklyn Union El. R. R. Co.* 218

COUNSEL.

Briefs of, on appeal should contain a fair statement of facts.

See APPEAL, 5.

COUNTERCLAIMS.

Jurisdiction of County Courts over counterclaims exceeding \$2,000 in amount.

See JURISDICTION.

COUNTIES.

When power of town officers to alter and improve state highway is not affected by section 77 of County Law.

See HIGHWAYS, 2.

Invalidity of resolution of board of supervisors attempting to extend term of town officers.

See TOWNS.

COUNTY COURTS.

Jurisdiction of, over counterclaims exceeding \$2,000 in amount.

See JURISDICTION.

COURT OF APPEALS.

Briefs of counsel on appeal to, should contain a fair statement of facts.

See APPEAL, 5.

When can take judicial notice of nothing but facts authenticated by public records.

See TRIAL, 2.

COURTS.

Jurisdiction of County Courts over counterclaims exceeding \$2,000 in amount.

See JURISDICTION.

COVENANTS.

Conveyance by the city of New York of pier not a conveyance in fee of land covered by the pier—effect of covenants contained in prior deeds of adjoining land under water to same grantee.

See TITLE, 5.

CREDITOR'S SUIT.

To compel executor to sell real estate under power of sale for payment of debts.

See DECEDENT'S ESTATE, 1-5.

CRIMES.

1. *Murder — Sufficiency of Evidence.* The evidence upon the trial of an indictment for murder reviewed and held sufficient to warrant a verdict convicting the defendant of the crime of murder in the first degree. *People v. Gaimari.* 84

2. *Evidence — Competency of Threats Made by Defendant.* Threats of the defendant to kill the deceased, made a short time before the homicide, are competent evidence especially when the homicide is claimed to have been excusable or justifiable, but should be received with caution, since many an idle threat is made, and words spoken under excitement are liable to be misunderstood. *Id.*

3. *Incompetency of Evidence of Specific Acts of Violence of Deceased Toward Third Person.* Where the accused claims that he acted in self-defense, it is competent to show the general reputation of the deceased for violence, but evidence of specific acts toward a third person, especially where it does not appear that defendant had heard of them, is inadmissible. *Id.*

CRIMES — Continued.

4. *Charge.* Error cannot be predicated upon a charge which is too lenient toward the defendant and is in accordance with the request of his counsel. *Id.*

5. *Uxoricide — Evidence of Reputation for Unchastity of Defendant's Alleged Paramour Incompetent upon the Question of Motive — Code Cr. Pro. § 542.* Upon the trial of an indictment for the murder of a husband or wife specific acts, declarations, conduct and occurrences tending to show improper relations with a person of the opposite sex are competent evidence upon the question of motive; but evidence as to the reputation for unchastity of the alleged paramour is incompetent; its reception constitutes reversible error and is not an error that can be overlooked as technical or unsubstantial under section 542 of the Code of Criminal Procedure. *People v. Montgomery.* 219

6. *Duty of Trial Court as to a Theory of the Prosecution Wholly Unsupported by Evidence.* Where in order to sustain a theory of the prosecution that the defendant had quarrelled with his wife and had assaulted her with a wooden stick, fracturing her skull, and to escape exposure had shot her, a stick found in the room where her body lay is introduced in evidence, but there is an utter failure of proof to support such theory, the court should have directed the attention of the jury to that fact and should have restrained the counsel for the prosecution in his summary from commenting upon a theory that had collapsed for want of evidence; and its refusal upon the request of defendant's counsel to charge that there was no evidence that the stick had been used by the defendant in the commission of an assault upon the deceased prior to the shooting, followed by arguments of the counsel for the prosecution in support of such theory and by a charge tending to dignify the theoretical assault into a reality, constitute errors for which a judgment of conviction must be reversed. *Id.*

7. *Murder — Sufficiency of Evidence — Insanity.* The evidence upon the trial of an indictment for murder reviewed and held sufficient to sustain a verdict convicting the defendant of the crime of murder in the first degree, including, as an essential part of such verdict, the finding that the defendant was sane when he committed the act. *People v. Tobin.* 278

8. *When Court Is Justified in Refusing to Appoint Commission under the Statute (Code Crim. Pro. § 658) to Examine Defendant and Report as to His Sanity.* Where a trial court, at the request of counsel for a defendant charged with the crime of murder, at the time the indictment was moved for trial, appointed two expert physicians to examine the defendant and report as to his sanity, and adjourned the trial until such report could be made, and the physicians, after making an examination, reported that in their judgment the defendant was sane, in which opinion a third physician, who at one time had charge of defendant, concurred, the court is justified, in the exercise of sound discretion, in denying a motion made in behalf of defendant, based upon the affidavits of his attorneys, for a commission, pursuant to section 658 of the Code of Criminal Procedure, to examine the defendant and report to the court as to his sanity at the time of the examination, where no evidence is presented to controvert the report of the medical experts, who examined the defendant, and to show that he was insane, except the affidavits of his counsel, which contained few facts and consisted mainly of the expression of their own opinions, unsupported by the affidavit of any physician. *Id.*

9. *Instruction as to Presumption of Sanity of Defendant.* An instruction to the jury that "if evidence is given tending to establish insanity, then the general question is presented * * * whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and if a reasonable

CRIMES — Continued.

doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of that doubt," must be considered as embodying the correct rule upon the subject. *Id.*

10. *Trial Court Not Bound to Charge Request of Counsel Where Substantially the Same Proposition Has Already Been Charged.* Where the court has carefully defined reasonable doubt and has charged in various ways that the jury must be convinced of the defendant's guilt beyond a reasonable doubt, and that if there is a reasonable doubt as to his sanity he is entitled to the benefit of that doubt, the refusal to charge substantially the same propositions in the language of defendant's counsel does not constitute reversible error. *Id.*

11. *Examination of Alleged Error in Charge — When Such Error Cannot Be Reviewed Without an Exception Thereto — Effect of Section 528, Code of Criminal Procedure.* An instruction by the trial court that it is "not necessary that every circumstance should be proved beyond a reasonable doubt," does not constitute reversible error where it is apparent that the court did not mean that every circumstance constituting a link in the chain of circumstances necessary to establish "the fact of killing by the defendant" need not be proved beyond a reasonable doubt, but that every incidental circumstance, such as those bearing upon the probabilities that the main circumstances were true, or that every fact essential to convict, such as "the death of the person alleged to have been killed," need not be proved beyond a reasonable doubt; moreover, such instruction cannot be reviewed under the statute (Code Crim. Pro. § 528) in the absence of a specific exception thereto, when the court is satisfied that the verdict is right and based upon evidence that is clear and convincing. *Id.*

12. *Murder — Sufficiency of Evidence.* The evidence upon the trial of an indictment for murder reviewed and held sufficient to sustain a verdict convicting the defendant of the crime of murder in the first degree. *People v. Ennis.* 280

13. *When Judgment Convicting Defendant of Murder Will Not Be Reversed in the Absence of Exceptions.* A judgment convicting a defendant of murder will not be reversed and a new trial ordered, in the absence of any exception, where the court is satisfied, upon a review of the record, that the evidence well supported the verdict of the jury; that it abundantly established the guilt and the responsibility of the defendant, and that his substantial rights have not been prejudicially affected. *Id.*

14. *Murder — Sufficiency of Evidence.* The evidence upon the trial of an indictment for murder reviewed and held sufficient to sustain a verdict convicting the defendant of the crime of murder in the first degree. *People v. White.* 831

15. *Evidence — Admissibility of Confession Procured by Deception — Code Cr. Pro. § 395 — Credibility of Witness Thereto a Question for the Jury.* Confessions made by one accused of crime may be given in evidence unless made upon a stipulation for freedom from prosecution or under the influence of fear produced by threats. (Code Cr. Pro. § 395.) The fact, therefore, that a confession was procured from a defendant charged with the crime of murder by a deception practiced by an officer in charge of him, which is not sanctioned by the Court of Appeals, does not make it incompetent. Confessions must be corroborated by proof "that the crime charged has been committed," and when so corroborated, the question of the credibility of the witnesses thereto and the circumstances under which the confessions are made are for the consideration of the jury. *Id.*

16. *How Competency of Confession Is to Be Determined.* The competency of a confession is to be determined by the trial court upon the facts in evidence at the time it is offered, and in all cases inquiry should be made

CRIMES — *Continued.*

whether the defendant spoke through fear or in the expectation of immunity, and when he is under arrest it should also be asked whether he spoke to the magistrate, or to the officer in charge, or in their presence, because he felt that he was compelled to for any reason, and it is proper to allow a preliminary examination by the defendant's counsel to test the competency of a confession before it is received. After it is received, if a question of fact arises as to its voluntary character, the jury should be instructed to wholly disregard it, unless they find that it was voluntarily made, without threat or menace by acts, words or situation, and without compulsion, real or apprehended, and without the promise, express or implied, that the defendant should not be prosecuted or that he should be punished less severely. *Id.*

17. *Trial — Instruction to Jury.* Where a confession procured from a defendant, who was imprisoned under a charge of murder, by an undersheriff pretending to be his friend and desiring to help him, and other confessions made to fellow-prisoners who were in the charge of the sheriff and subject to his influence, are offered in evidence and it appears that there is evidence to bring all of the confessions within the permission of the statute (Code Cr. Pro. § 895), but none to bring any of them within the prohibition thereof, except the statement of the defendant himself, which was denied by several witnesses, and the confessions are corroborated, one in nearly every particular and the others in several substantial particulars, it is not erroneous to submit to the jury the question of fact whether any of the confessions fell within the prohibition of the statute or of the rules of evidence, where they are instructed to disregard them if they were made under the influence of fear produced by actual or covert threats, or through promises, acts of intimidation or other unlawful means, and unless they were voluntary, fairly obtained and not procured by inquisitorial compulsion or other improper methods. *Id.*

18. *Constitutional Law — Personal Rights.* Articles 4 and 5 of the amendments to the Constitution of the United States relating to personal rights do not apply to actions in the courts of the state of New York. *People v. Adams.* 351

19. *Evidence — Admissibility on Criminal Trial of Private Papers Alleged to Have Been Unlawfully Obtained.* The court when engaged in the trial of a criminal case will not take notice of the manner in which witnesses have possessed themselves of private papers or other articles of personal property, which are material and are properly offered in evidence. *Id.*

20. *Same — When Admission of Private Papers Not Violative of Constitutional Guaranty Against Compelling Prisoner to Be a Witness Against Himself — Const. Art. 1, § 6.* The admission in evidence upon the trial of an indictment under section 344a of the Penal Code, relating to policy playing, of private papers and property belonging to the defendant, alleged to have been unlawfully seized by police officers and introduced by the prosecution for the purpose of establishing his handwriting on certain policy slips, and to show that the office in which they were found was occupied by him, does not compel him to become a witness against himself in violation of section 6 of article 1 of the Constitution of the state of New York. *Id.*

21. *Policy Gambling — Constitutionality of Sections 344a and 344b of Penal Code — What Public Officers May Lawfully Be in Possession of Apparatus Used in Game of Policy.* Section 344a of the Penal Code, creating the crime of "policy" gambling and making it unlawful for any person to have in his possession the apparatus therefor, is not an unauthorized interference with the ownership of private property and is constitutional. Section 344b, making the possession by any person

CRIMES — *Continued.*

other than a public officer of such apparatus "presumptive evidence of possession thereof knowingly and in violation of" the preceding section, creates no offense, but simply prescribes a rule of evidence within the power of the Legislature, and is also constitutional. Neither section depends upon the other, each being complete in itself. The public officers intended to be excepted by the Legislature are those who, in the discharge of their official duties, are necessarily at times the custodians of the apparatus, and this provision, therefore, is not objectionable as class legislation. *Id.*

22. *Constitutionality of Indeterminate Sentence Law* — *Penal Code*, § 687a. Section 687a of the Penal Code, fixing a maximum and minimum sentence for prisoners, must be considered in connection with the law relating to prisons, permitting the parole of such prisoners, is a merciful exercise of legislative power and is constitutional. *Id.*

23. *Evidence — Non-existence of Search Warrant Immaterial*. The refusal of the trial court to allow evidence as to the non-existence of a search warrant at the time of the removal of apparatus from the place claimed to have been occupied by the defendant as an office is not error, such apparatus being competent evidence and the manner of obtaining possession of it being immaterial. *Id.*

24. *The State Charities Law — Jurisdiction of New York City Magistrate to Sentence Women to State Reformatory at Bedford under Section 146 Thereof — Conviction Must Be for Offenses Enumerated Therein*. Under section 146 of the State Charities Law (L. 1896, ch. 546, as amd. by L. 1899, ch. 632), providing that "A female, between the ages of fifteen and thirty years, convicted by any magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane, nor mentally or physically incapable of being substantially benefited by the discipline of either of such institutions, may be sentenced and committed to * * * the New York State Reformatory for Women at Bedford," a magistrate of the city of New York has no jurisdiction to sentence a woman to such reformatory unless she is convicted of one or more of the offenses enumerated therein; and a conviction thereunder is improper where it is impossible to determine, from the records and papers relating to the conviction and sentence returned upon writs of habeas corpus and certiorari allowed in her behalf, whether she was convicted of being a prostitute, either "public" or "common," assuming these terms to be practically synonymous, or on the charge of "disorderly conduct;" but, assuming that it is reasonably certain that the magistrate intended to convict the relator of "disorderly conduct," then the conviction is not a valid conviction for a misdemeanor, and, therefore, within the purview of the State Charities Law, unless the offense complained of constitutes a misdemeanor as defined by law; and where the record fails to show that the disorderly conduct complained of comes within the meaning of section 1458 of the Consolidation Act, which seems to have been incorporated into the Greater New York charter, or that of section 875 of the Penal Code, relating to the offense of disorderly conduct, so that it constitutes the offense of "disorderly conduct," as therein defined, and, therefore, is a misdemeanor, the relator is properly discharged from custody. *People ex rel. Clurk v. Keeper, etc.* 465

Witness in any criminal case not compelled to give any evidence against himself.

See CONSTITUTIONAL LAW, 2-4.

Unlawful omission to provide medical attendance for a minor child.

See PARENT AND CHILD, 1-5.

DAMAGES.

Measure of, in action for damages resulting from conspiracy to wreck corporation.

See CORPORATIONS, 1.

Measure of, where a portion of a tract of land is taken for use of railroad.

See EMINENT DOMAIN.

For loss of property — when evidence of value admissible.

See EVIDENCE 2, 3.

Caused by change of grade in street — proceedings to recover.

See STREETS, 1, 2.

DEBTOR AND CREDITOR.

When creditor not barred from taking under assignment by commencement of action to set it aside.

See ASSIGNMENT, 2.

When payment to foreign administrator after appointment of administrator in this state discharges debt.

See EXECUTORS AND ADMINISTRATORS.

Moneys advanced subject to election of executors to treat advancement as a loan — interest runs from time of election.

See INTEREST.

Rights of surety which has paid judgment recovered in tort against several joint tortfeasors and has been subrogated to rights of the judgment creditor thereunder — contract by one of several joint debtors under judgment in tort to pay part thereof in consideration of his release therefrom — when such joint debtor will not be relieved from contract because of similar contract made with other joint debtors — when judgment debtor not entitled to injunction restraining surety from enforcing his agreement to pay part of the joint judgment.

See SUBROGATION, 1-3.

DECEDENT'S ESTATE.

1. *Equity — Creditor's Action to Compel Executor to Sell Real Estate under Power of Sale for Payment of Debts.* Where the personal estate of a decedent is insufficient to satisfy his debts a creditor may maintain an action in equity to establish his claim and to compel an executor having a testamentary power to sell designated real estate "for the purpose of paying debts," to sell the same and apply the proceeds to the extinguishment of the debt. *Holly v. Gibbons.* 520

2. *Acknowledgment by Executor Prevents Running of Statute of Limitations.* It is not only the right, but the duty of the executor to discharge the debt, and his acknowledgment thereof, by making payments thereon from time to time, prevents the running of the Statute of Limitations, the principle of the rule that prevents an executor from reviving a debt against the estate of his testator which is barred by the statute having no application to a case where he performs his legal duty in keeping it in force. *Id.*

3. *Former Adjudication Dismissing Proceeding for an Accounting Not a Bar.* A former adjudication of the Surrogate's Court, the only effect of which was to dismiss the creditor's petition for an accounting, containing the statement that the proceeding was "barred by the Statute of Limitations," does not constitute a final adjudication upon the validity of his claim and is not a bar to the maintenance of the action. *Id.*

DECEDENT'S ESTATE — *Continued.*

4. *Failure to Legally Serve Non-resident Devisee with Process Fatal to Judgment.* A devisee under the will, of the real estate directed to be sold, having an interest therein subject to the exercise of the power of sale, is a necessary party to such an action; and where the devisee who was a non-resident was made a party defendant, but by reason of a non-compliance with section 489 of the Code of Civil Procedure was never legally served with process and did not appear, a judgment in plaintiff's favor must be reversed. *Id.*

5. *Erroneous Direction of Sale by Referee.* A direction in the judgment that the real estate be sold through a referee is improper in the absence of an allegation or finding that the executor was unfit or without capacity to execute the power of sale. *Id.*

When payment to foreign administrator, after appointment of administrator in this state, discharges debt.

See EXECUTORS AND ADMINISTRATORS.

Moneys advanced subject to election of executors to treat advancement as a loan — interest runs from time of election.

See INTEREST.

Section 220 of Tax Law, imposing transfer tax upon exercise of power of appointment, constitutional.

See TAX, 4, 5.

When void intermediate trust, created by codicil, may be expunged without changing testator's plan for disposition of his property, the will must be sustained.

See WILL, 1.

Construction of clause in will, appointing trustees residuary legatees — residuary estate resulting from invalid trust passes to such residuary legatees.

See WILL, 2.

DEED.

Admissibility of tax deed in evidence.

See EVIDENCE, 1.

Of land bounded by and surrounding inland pond, when does not convey the land under waters of the pond — when conveys easement, or right, to overflow such land with waters collected and stored by dam, leaving title and benefits thereof in grantor — effect of agreement by grantor to buy back easement if not used by grantee.

See RIPARIAN RIGHTS, 1-3.

When state tax deed void for failure of comptroller to give statement of unpaid taxes on land when requested by owner.

See TAX, 2, 3.

Conveyance by the city of New York of pier not a conveyance in fee of land covered by the pier — effect of covenants contained in prior deeds of adjoining land under water to same grantee.

See TITLE, 5.

DEFENSE.

Discharge in bankruptcy not a defense to action for embezzlement and misappropriation of funds.

See BANKRUPTCY.

Payment to *de facto* clerk is a defense to action for salary by *de jure* clerk.

See NEW YORK (CITY OF), 5.

DEFINITIONS.

Meaning of medical attendance.

See PARENT AND CHILD, 4.

EASEMENTS.

When deed of land surrounding pond conveys easement or right to overflow such land with waters collected and stored by dam, leaving title and benefits thereof in grantor — effect of agreement by grantor to buy back easement if not used by grantee.

See RIPARIAN RIGHTS, 2.

EJECTMENT.

1. *Grant Obtained by Fraud — When Plaintiff May Attack Its Validity, Although Negligent in Failing to Read It.* The negligence of the plaintiff in an action of ejectment against a telephone company to recover lands occupied by its poles, in failing to read an instrument executed by him under seal, granting to the defendant the right to construct and maintain its lines over and along his property, does not preclude him from attacking the validity of the paper where it appears that his signature thereto was obtained by fraud, in that he relied in signing it upon the statement of defendant's agent that the paper was a receipt for a dollar, which he wished to pay him for trimming one of his trees, and the direction of a nonsuit upon that ground is reversible error. *Wilcox v. Am. Tel. & T. Co.* 115

2. *When Resort to Equitable Action Unnecessary — Consideration Need Not Be Returned.* Under such circumstances the action is properly brought; the plaintiff is not obliged to appeal to a court of equity for relief against the grant, but when it is set up to defeat his claim he may avoid its effect by proof of the fraud by which it was obtained; nor is he obliged to return the dollar paid to him on its execution; the rescission of a contract induced by fraud is not attempted; the fraud charged relates, not to the contract, but to the instrument purporting to represent it. *Id.*

ELECTION.

Of remedies.

See ASSIGNMENT, 1, 2.

EMBEZZLEMENT.

Discharge in bankruptcy not a defense to action for.

See BANKRUPTCY.

EMINENT DOMAIN.

Railroads — Measure of Damages Where a Portion of a Tract of Land Is Taken. Where land is acquired by a railroad company without the consent of the owner, he is entitled to recover the market value of the premises actually taken and also any damages resulting to the residue, including those which will be sustained by reason of the use to which the portion taken is to be put by the company. *South Buffalo Ry. Co. v. Kirkover.* 301

What costs may be recovered by landowner successfully defending condemnation proceedings.

See COSTS.

Condemnation of rights of owners of waters of inland pond and rights of owners of land surrounding the pond and under waters of the same — when owner of bed of pond entitled to substantial damages therefor.

See RIPARIAN RIGHTS, 3.

Effect of assessment made while proceeding for condemnation of property is pending.

See TAX, 1.

EMINENT DOMAIN — *Continued.*

Appraisal of property of water works company, made by commissioners in condemnation proceedings, illegal and erroneous when based upon invalid contract of purchase.

See WATER WORKS, 8.

EQUITY.

Creditor's action to compel executor to sell real estate under power of sale for payment of debts.

See DECEDENT'S ESTATE, 1-5.

EVIDENCE.

1. *Competency of Tax Deed.* Under section 132 of the Tax Law (L. 1896, ch. 908) a tax deed executed by a county treasurer, which has for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, is admissible in evidence without proof of the regularity of the proceedings upon which it is based. *Baer v. McCullough.* 97

2. *Action to Recover Alleged Agreed Value of Lost Property — When Evidence of Expert Admissible to Show That Such Value Was Excessive.* In an action to recover damages for the loss of property, consisting of a bicycle and models of a patented improvement thereto, received by defendant for examination at his risk and at an alleged agreed valuation, the testimony of an expert as to what it would cost to reproduce by hand a model, fashioned after the patents of the lost models, is admissible, since the question whether the sum demanded and claimed to have been agreed upon as the value of the lost property is to be regarded as liquidated damages, or merely as a penalty, is a question of intent to be deduced from the circumstances, and if the sum demanded is an unreasonable price for the property, evidence tending to show that fact is material upon the question of damages. *Hicks v. Monarch Cycle Mfg. Co.* 111

3. *Erroneous Ruling Excluding Such Evidence.* A ruling of the trial court, excluding such evidence, cannot be sustained upon the ground that it related only to the models and not to all of the articles in question and was, therefore, improper and immaterial; the defendant had the right to give the value of the different articles separately and, in that way, establish their total value. *Id.*

4. *Competency of Facts Showing Hostility of Witness.* Testimony of a party as to the hostility of witnesses called to impeach him is competent for the purpose of affecting their credibility. *Brink v. Stratton.* 150

5. *Religious Belief of Witness.* A witness cannot be interrogated as to his belief in the existence of a Supreme Being, who would punish false swearing, for the purpose of affecting his credibility. *Id.*

Objection to.

See APPEAL, 2.

Witness in any criminal case not compelled to give any evidence against himself — when determination whether answer will incriminate him rests with witness.

See CONSTITUTIONAL LAW, 2-4.

Sufficiency of, on trial for murder — competency of threats made by defendant — incompetency of evidence of specific acts of violence of deceased toward third person.

See CRIMES, 1-3.

Of reputation for unchastity of defendant's alleged paramour incompetent upon the question of motive on trial for murder of wife.

See CRIMES, 5.

EVIDENCE — Continued.

Sufficiency of, on trial for murder.

See **CRIMES**, 7, 12, 14.

Admissibility of confession procured by deception — how competency of confession is to be determined.

See **CRIMES**, 15-16.

Admissibility on criminal trial of private papers alleged to have been unlawfully obtained — when evidence of non-existence of search warrant immaterial.

See **CRIMES**, 19, 20, 23.

Testimony of experts not competent to support conclusion that a policy of title insurance should have been different in form.

See **INSURANCE**, 8.

Accounting — testimony as to explanation to plaintiff of mistakes in inventory, when inadmissible.

See **TRIAL**, 1.

EXECUTORS AND ADMINISTRATORS.

When Payment to Foreign Administrator After Appointment of Administrator in this State Discharges Debt. The payment by a savings bank in the city of New York of a deposit, made by a decedent who was a resident of another state, to an administrator appointed therein, is good and discharges the indebtedness, although several months prior thereto an administrator had been appointed in this state, when the payment is made in good faith and without actual notice of such appointment and it does not appear that the decedent had any creditors in this state; and the fact that the appointment was a matter of record in the surrogate's office is not sufficient to charge the bank with constructive notice thereof. *Maas v. German Savings Bank.* 377

Creditor's action to compel executor to sell real estate under power of sale for payment of debts.

See **DECEDENT'S ESTATE**, 1-5.

EXPERTS.

When evidence of expert admissible to show that alleged agreed value of lost property was excessive.

See **EVIDENCE**, 2, 3.

Testimony of, not competent to support conclusion that policy of title insurance should have been different in form.

See **INSURANCE**, 8.

FALSE REPRESENTATIONS.

1. *Action for Damages Will Not Lie Between Members of Two Firms Having One Member Common to Both.* One induced by the false representations of a member of a firm to purchase the interests of his copartners and take their place in a new firm, to be composed of himself and such partner, cannot individually maintain an action against the firm to recover the damages alleged to have resulted therefrom; nor can it be maintained by the new firm, since an action at law for deceit will not lie between members of two firms having one member common to both. If any cause of action exists, the rights of the parties must be adjusted by a court of equity. *Taylor v. Thompson.* 168

2. *When Firm Not Liable for False Representations of Partner.* Where upon the trial of such an action it appears that the partner making the false representations acted independently in negotiating the sale and principally and primarily for his own benefit and not as agent of the firm, his associates cannot be held liable in any event. *Id.*

FORECLOSURE.

Of mechanic's lien.

See APPEAL, 3.

Sale in, when not within condemnation of statute of champerty.

See CHAMPERTY.

Of mechanic's lien — dismissal of action — when new action may be commenced within one year thereafter.

See LIENS.

FORMER ADJUDICATION.

Dismissing proceeding for an accounting when not a bar to creditor's action to compel executor to sell real estate under power of sale for payment of debts.

See DECEDENT'S ESTATE, 1-5.

FRANCHISE TAX.

Upon foreign insurance corporation.

See TAX, 6.

FRAUD.

By agent of telephone company in obtaining grant of right to construct lines over lands of grantor — ejectment, when maintainable.

See EJECTMENT, 1, 2.

Insufficiency of general allegation of.

See PLEADING.

GAMBLING.

Policy — trial of indictment for.

See CRIMES, 18-23.

GRADE.

Change of, in street — proceedings for damages caused thereby.

See STREETS, 1, 2.

GUARDIAN AND WARD.

Check Drawn by Guardian Notice to Payee That Fund Belongs to Ward — Funds Mingled with Those of the Ward Belong Presumptively to Ward — Burden of Proof. Checks drawn upon a guardian's account in which moneys belonging to a corporation of which he was the manager had also from time to time been deposited, signed by him as guardian, and given in payment of a debt due from the corporation, give presumptive notice to the payee that the funds paid him were not those of the corporation or of the drawer personally, and he is put on inquiry to ascertain the latter's authority to apply the money in payment of the debt; presumptively, all the moneys in the account belong to the wards, and in the absence of affirmative proof that at any time any particular sum on deposit was the property of the corporation they are entitled to recover the proceeds of the checks. *Cohnfeld v. Tanenbaum.* 126

Duty to furnish medical attendance to minor child imposed by statute on guardians.

See PARENT AND CHILD, 3.

HIGHWAYS.

1. *New York and Albany Post Road — Power of Town Officers of Town of Hyde Park to Alter and Improve Same — Not Affected by Chapter 423 of Laws of 1896.* The town board and commissioners of highways of the town of Hyde Park, Dutchess county, having had, under colonial laws and statutes of the state prior to the enactment of chapter 423 of the

HIGHWAYS — *Continued.*

Laws of 1896, the power to alter and improve the New York and Albany post road, running through that town, such power is not restricted or taken away by the latter act, since there is nothing in the provisions thereof that in any manner limits their jurisdiction or powers over that highway, except in one particular, that they are prohibited thereby from authorizing or licensing the laying of any railroad track upon the highway, except to cross the same; they have, therefore, the power, upon the petition of a taxpayer of the town, to authorize an alteration and improvement of a part of said road, lying within the town and within the premises of the petitioner, such improvement to be made by petitioner and at his expense, and upon the satisfactory completion thereof, to accept the road as changed and improved. *People ex rel. Dinsmore v. Vandewater.* 500

2. *Power of Town Officers of Town of Hyde Park Not Restricted or Affected by Section 77 of the County Law, Relating to the Alteration of State Roads.* The power of the town board and highway commissioners to authorize the alteration and improvement in question is not restricted or made dependent upon the consent of the board of supervisors of Dutchess county by the provisions of section 77 of the County Law (L. 1892, ch. 686), providing that the board of supervisors of any county may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state, since it is apparent, from an examination of the Colonial Laws (Col. Laws, 1703, ch. 131; 1772, ch. 1536, and 1772, ch. 31), and the statutes of the state (L. 1779, ch. 43; L. 1813, ch. 33), relating to the laying out, construction and maintenance of the New York and Albany post road and other public highways established prior to 1813, that under the colonial laws as early as 1772, especially in Dutchess county, where the alteration in question was made, commissioners of highways were empowered to alter highways that were deemed inconvenient, and that this power was continued by the state legislature in 1779 and by general laws in 1797 and 1813, and that the same power has been continued until the present day; it follows, therefore, that at the time of the passage of the County Law and of chapter 317 of the Laws of 1892, and even of chapter 33 of the Laws of 1817, the substance of which statutes is contained in section 77 of the County Law, the commissioners of highways of towns had been given jurisdiction over the existing colonial highways, with the power to make such needed alterations therein as should be deemed necessary, and that power has not been taken from them by the County Law. *Id.*

Rights of general public over places where land highways and navigable waters meet.

See TITLE, 3.

HUSBAND AND WIFE.

Liability of Husband for Goods Purchased by Wife—Wife's Agency a Question of Fact. A husband living with his wife, who supplies her with necessaries suitable to her position and his own, or furnishes her with ready money with which to pay cash therefor, is not liable for the purchase price of other goods sold to her, of the same character as necessaries, in the absence of affirmative proof of his prior authority or subsequent sanction, the question of the wife's agency being one of fact and not a conclusion of law to be drawn alone from the marital relation. *Wanamaker v. Weaver.* 75

INDICTMENT.

For unlawful omission to provide medical attendance for a minor child, when sufficient.

See PARENT AND CHILD, 1.

INFANTS.

Unlawful omission to provide medical attendance for a minor child.

See PARENT AND CHILD, 1-5.

INJUNCTION.

When judgment debtor not entitled to injunction restraining surety from enforcing his agreement to pay part of a joint judgment.

See SUBROGATION, 3.

INSANITY.

When court is justified in refusing to appoint commission to examine defendant on trial for murder as to his sanity — instruction as to presumption of sanity.

See CRIMES, 7-9.

INSURANCE.

1. *Title Insurance—What Is Insured by Policy of.* A policy of title insurance undertaking to insure the holder thereof against all loss and damage, not exceeding a specified sum, which the insured shall sustain by reason of any defect or defects of title, affecting the title of the property insured thereby and the interest of the insured therein, or by reason of unmarketability of the title of the insured to or in the premises, or by reason of liens or incumbrances charging the same at the date of the policy, is a contract designed to save the insured harmless from any loss through defects, liens or incumbrances that may affect or burden his title when he takes it, and from the very nature of the contract it usually bears the same date as the deed of the title which it purports to insure, and if, in any case, there is a discrepancy between such dates it must be due to some exceptional circumstance which should be noted in the contract. *Trenton Potteries Co. v. Title G. & T. Co.* 65

2. *Reformation of Policy—When Insurer Not Liable for Assessment Levied on Property after Conveyance to Insured, but Before Date of Issuance of Policy.* Where a policy of title insurance covering five separate pieces of property was not issued at the time the deeds of four of the parcels were delivered and accepted, but its issuance was postponed until after the title to the fifth parcel was perfected, evidence of the facts and circumstances under which the contract of insurance was made showing that there was no purpose on the part of either of the parties to have any of the titles insured beyond the moment when they became the property of the insured; that the issuance of a single policy after all the titles were perfected was agreed upon as a matter of convenience with no thought of changing the liability of the insurer from what it would have been if a policy upon the first four titles had been issued when the conveyances thereof were made, and that there was no mistake as to the actual terms of the agreement expressed in the policy, but that in reducing it to writing the real date as to a part thereof was inadvertently omitted, will justify the trial court in reforming the policy so as to make it conform to the actual agreement of the parties; and the insured cannot maintain an action to compel the insurer to reimburse the insured for the amount paid upon an assessment for a street opening, which became a lien upon one of the four parcels three months after the insured had taken title thereto and seven months before the policy was issued. *Id.*

3. *Evidence—Testimony of Experts Not Competent to Support Conclusion That the Policy Should Have Been Different in Form.* Testimony of experts in title insurance as to what they would have done, or what ought to have been done, in the issuance of the policy in question, and as to the custom of title insurance companies in such cases, is not admissible to support the legal conclusion that the policy should have been different in form. *Id.*

INSURANCE — Continued.

4. *Life — Restriction of Power of Agents.* A life insurance company may enter into a contract with an applicant for insurance which can so fix the precise conditions under which the policy shall issue that agents, general or local, in the absence of express authority, cannot waive them. *Russell v. Prudential Ins. Co.* 178

5. *When Provision in Application for Insurance That Policy Shall Not Take Effect until First Premium Be Paid Thereon in Full Charges Applicant With Notice That Agents Without Express Authority Have No Power to Waive it.* Where a written application for a policy of life insurance, duly signed by the applicant, provides that the application is to become a part of the contract of insurance applied for; that the policy to be issued thereunder shall be accepted subject to the conditions and agreements therein contained; that the policy "shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full," which provision is carried into the policy with due reference to the same, the applicant must be presumed, in the absence of fraud, to have read or had read to him the application before signing it, and he is thereby advised that the policy cannot issue or take effect until the first premium is paid thereon in full; the legal effect is that he covenants directly with the company, not through its agent, that the policy is not to be binding until the first premium is paid in full, and he is chargeable with notice that the agent, whether general or local, cannot, without express authority, waive such payment and deliver a valid policy. *Id.*

6. *Same.* Where it appears in an action brought upon such policy by the beneficiary named therein that, at the time the policy was delivered to the insured, a general agent of the company extended the time of payment of the premium for thirty days from such delivery, stating that the insurance would go into immediate effect, and the insured died four days thereafter, and before the premium was paid, the beneficiary cannot recover without proof of the agent's express authority to waive the payment of the first premium. *Id.*

Benefit association — unreasonable by-laws cannot deprive members of their rights.

See ASSOCIATIONS, 1, 2.

INSURANCE CORPORATIONS.

Foreign — franchise tax upon.

See TAX, 6.

INTEREST.

Moneys Advanced Subject to Election of Executors to Treat Advancement as a Loan — Interest Runs from Time of Election. Under a written instrument executed by a son acknowledging that his father had furnished him a specified sum of money; that it was not a gift, but a debt due the father; that it might be collected after his father's decease by his legal representatives at their election by treating it as a loan and enforcing it, or as an advancement, deducting it from his share in the estate; when such sum is enforced as a loan, interest should be awarded from the day when the executors elected to treat it as such, and not from the time the money was advanced by the father. *Cole v. Andrews.* 374

On claim against city of New York runs only from time of demand of payment.

See NEW YORK (CITY OF), 4.

JUDGMENT.

Modification of.

See APPEAL, 3.

JURISDICTION.

County Courts — Jurisdiction of, Over Counterclaims Exceeding \$2,000 in Amount. While the jurisdiction of County Courts in actions for the recovery of money only is limited by section 14 of article VI of the Constitution and section 840 of the Code of Civil Procedure to actions in which the complaint demands judgment for a sum not exceeding \$2,000, such limitation is based wholly on the demand of the complaint, and, after jurisdiction of a cause of action has once been acquired, a County Court has, under section 848 of the Code of Civil Procedure, "the same jurisdiction, power and authority in and over the same and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case;" and so the general jurisdiction to entertain common-law actions, where the demand for judgment in the complaint does not exceed \$2,000, carries with it the power to try and render any judgment upon any counterclaim irrespective of the amount that the defendant may plead in his answer to the cause of action stated in the complaint. *Howard Iron Works v. Buffalo Elevating Co.* 1

Of magistrate to sentence women to state reformatory under section 146 of State Charities Law.

See CRIMES, 24.

LABOR LAW.

When insertion of invalid provisions of, in specifications, does not render contract void.

See NEW YORK (CITY OF), 7.

LEGISLATURE.

Power of, to prescribe that submerged land in city of New York should be used for streets.

See TITLE, 4.

LIENS.

Mechanic's Lien — Action to Foreclose — When Action Commenced Within One Year After Filing Lien Is Dismissed for Lack of Evidence a New Action May Be Commenced under Code Civ. Pro. § 405, Within One Year After Final Determination of First Action. Where a mechanic's lien was filed January 24, 1889, and an action to foreclose the lien, duly commenced February 15, 1889, was dismissed "on the merits," for failure to furnish an architect's certificate of performance of the work, by a judgment entered August 4, 1899, and, on appeal, the Appellate Division, on March 9, 1900, modified the judgment by striking therefrom the words "on the merits," and affirmed it as modified, a new action to foreclose the lien, commenced March 15, 1900, is not barred by the provision of the Lien Law, that a lien shall not continue for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, since the statute does not in express terms prohibit an action to foreclose a lien unless that action be commenced within one year, but enacts that the lien shall cease unless an action be brought thereon within one year; the first action was commenced within that time, and, therefore, the cause of action is saved by the statute (Code Civ. Pro. § 405), which provides that if an action be commenced within the time limited therefor, and be terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or termination. *Conolly v. Hyams.* 408

Modification of judgment in action to foreclose mechanic's lien.

See APPEAL, 8.

LIFE INSURANCE.

Restriction of power of agents — when provision in application for insurance that policy shall not take effect until first premium be paid thereon in full charges applicant with notice that agents without express authority have no power to waive it.

See INSURANCE, 4-6.

LIMITATION OF ACTIONS.

Little Falls (City of) — *Validity of Provisions of Charter Prohibiting Maintenance of Actions to Set Aside or Annul Assessments for Local Improvements Unless Commenced within Prescribed Time and in Compliance with Prescribed Conditions.* The legislature having power to absolutely prohibit an action to set aside, cancel or annul any assessment made for a local improvement, such power necessarily includes the power to prohibit the commencement of such an action unless specified conditions are complied with; it, therefore, had the power to enact the provisions of the charter of the city of Little Falls (L. 1898, ch. 199, § 83, as amd. by L. 1899, ch. 289), providing that no such action shall be maintained by any person unless "commenced within thirty days after the delivery of the assessment roll and warrant for such local improvement to the city treasurer and notice by him in the official newspapers of the city of the receipt thereof, and unless within said thirty days an injunction shall have been procured by such person from a court of competent jurisdiction restraining the common council from issuing the assessment bonds hereinafter provided to be issued for such assessment," and such provision is valid and is a bar to any action not commenced within the time, and in compliance with the conditions, therein prescribed. *Loomis v. City of Little Falls.* 31

Acknowledgment of debt by executor prevents running of Statute of Limitations.

See DECEDENT'S ESTATE, 2.

LITTLE FALLS (CITY OF).

Validity of provision of charter prohibiting maintenance of actions to set aside or annul assessments for local improvements unless commenced within prescribed time and in compliance with prescribed conditions.

See LIMITATION OF ACTIONS.

MAGISTRATES.

Jurisdiction of, to sentence women to state reformatory under section 146 of State Charities Law.

See CRIMES, 24.

MARRIED WOMEN.

Liability of husband for goods purchased by wife — wife's agency a question of fact.

See HUSBAND AND WIFE.

MECHANIC'S LIEN.

Modification of judgment in action to foreclose.

See APPEAL, 3.

Dismissal of action to foreclose — when new action may be commenced within one year thereafter.

See LIENS.

MEDICAL ATTENDANCE.

When omission to furnish, for a minor child is unlawful — test of necessity for — reasonable discretion — duty to furnish to minor child imposed by statute on guardians, parents and those in *loco parentis* — meaning of.

See PARENT AND CHILD, 1-5.

MISAPPROPRIATION.

Discharge in bankruptcy not a defense to action for.

See BANKRUPTCY.

MISDEMEANOR.

Unlawful omission to provide medical attendance for a minor child.

See PARENT AND CHILD, 1-5.

MISJOINDER.

Action for damages resulting from conspiracy to wreck corporation must be brought by corporation, not by individual stockholder.

See CORPORATIONS, 1.

MORTGAGE.

Purchase-money — when not champertous.

See CHAMPERTY.

MUNICIPAL CORPORATIONS.

Private use of public streets — presumption arising from lapse of time that user is with consent of the public authorities may be dispelled by proof.

See NEW YORK (CITY OF), 8-12.

MURDER.

Trial for — sufficiency of evidence — competency of evidence of threats made by defendant — incompetency of evidence of specific acts of violence of deceased toward third person — charge.

See CRIMES, 1-4.

Uxoricide — evidence of reputation for unchastity of defendant's alleged paramour incompetent upon the question of motive — duty of trial court as to a theory of the prosecution wholly unsupported by evidence.

See CRIMES, 5, 6.

Sufficiency of evidence on trial for — insanity — when court is justified in refusing to appoint commission to examine defendant and report as to his sanity — instruction as to presumption of sanity of defendant — trial court not bound to charge request of counsel where substantially the same proposition has already been charged — when alleged error in charge cannot be reviewed without an exception thereto.

See CRIMES, 7-11.

Sufficiency of evidence on trial for — when judgment of conviction will not be reversed in the absence of exceptions.

See CRIMES, 12, 13.

Sufficiency of evidence on trial for — admissibility of confession procured by deception — credibility of witness thereto a question for the jury — how competency of confession is to be determined — instruction to jury.

See CRIMES, 14-17.

NAVIGATION.

Collision at sea.

See NEGLIGENCE, 3.

NEGLECT.

1. *When Contributory Negligence a Question of Fact.* A bicyclist riding after dark between two rails of a railroad track upon a public street in which a trench was being excavated about three feet from the track, along which a manhole was constructed extending to within a foot of the track, which street was closed upon that side by barricades upon which at

NEGLIGENCE — *Continued.*

intervals red lights had been placed, who, in order to avoid another bicycle and a car upon the other track coming from the opposite direction, turns out and, attempting to proceed upon the strip between the track and the trench, falls into the manhole and is injured, is not as matter of law guilty of contributory negligence. *Walsh v. Central N. Y. Tel. & T. Co.* 163

2. *Degree of Care.* Ordinary care or precaution to avoid danger must be commensurate with the danger and will dictate and require a degree of vigilance under one set of circumstances that would be unnecessary under another. A refusal to charge, therefore, upon the trial of an action to recover damages for the injury, that the red lights and the dirt thrown up in the excavation of the trench indicated that there was danger, and that the plaintiff was bound to exercise unusual care in passing that locality, and that by unusual care was meant greater care than would be required in passing over a street without obstacles and in which excavations did not appear, constitutes reversible error. *Id.*

3. *Collision at Sea — Erroneous Refusal to Charge.* Upon the trial of an action against a steamship company for negligence resulting in the death of plaintiff's intestate, who was drowned as the result of a collision between a steamship and a pilot schooner on which he was employed, the defendant is entitled to have the jury instructed, in substance, that it was the duty of those navigating the schooner, when approaching another vessel, to have a "lookout" and keep a man at the wheel and not allow the schooner to drift before the wind, and a refusal to charge requests to that effect constitutes reversible error. *Grube v. Hamburg-American S. S. Co.* 883

When plaintiff may attack validity of grant obtained from him by fraud although negligent in failing to read instrument.

See EJECTMENT, 1, 2.

In construction and maintenance of sewer.

See TRIAL, 5.

NEW YORK (CITY OF).

1. *Board of Education, Not the City, the Proper Party Defendant in Suits Relating to School Funds.* Under the provisions of the charter of the city of New York (L. 1901, ch. 486) the only relation that the city has to the subject of public education is as the custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disburse the same according to the instructions of the board of education. The city, as trustee, has the title to the money, but it is under the care, control and administration of the board of education, and all suits in relation to it must be brought in the name of the board. A suit to recover teachers' wages is a suit affecting or in relation to the school funds and under the express words of the statute must be brought against the board. *Gunnison v. Bd. Education City of N. Y.* 11

2. *Same.* An action brought by a school teacher in the city of New York, to recover wages or salary, when the only object and purpose of such action is to establish the validity of a disputed claim and liquidate the amount, must be brought against the board of education and not against the city. *Id.*

3. *Board of Education an Independent Corporation, Not a City Agency.* The mere fact that the legislature has made the board of education a member of one of the administrative departments of the city of New York does not indicate an intent to devolve upon the city itself, acting through one of its departments, the state functions which were formerly directly imposed upon the board as a separate public corporation and to relegate it to an agency similar to that occupied by the police, fire, health and other

NEW YORK (CITY OF) — Continued.

city departments, of which the city is the responsible head; nor does the fact that the charter (§ 1055) expressly authorizes the board to bring suits affecting school property exclude the idea that it may also defend them and prevent it from becoming a party defendant in such cases; nor does section 1614, requiring future suits against the city to be in the corporate name of the city of New York, have any application, since such suits are not against the city but are against another and independent corporation, namely, the board of education.

The fact that the charter enumerates among the administrative departments of the city the board of education, calling it the "Department of Education," of which the board is the head, does not make any change in the corporate powers, duties or liabilities of the board and, therefore, does not affect its legal capacity to sue and be sued.

Nor does the fact that the board is the head of the department exempt it from such suits because it is not a mere agent of the city but is an independent corporate body whose acts are not the acts of the city and for which the city is not responsible. *Id.*

4. *Interest on Claim against City — Runs Only from Time of Demand of Payment.* When a judgment is recovered against the city of New York for various sums due upon a contract for paving certain streets, interest cannot be awarded upon such claims from the maturity thereof, but only from the time that payment was demanded. *O'Keeffe v. City of New York.* 297

5. *Payment to De Facto Clerk Is a Defense to Action for Salary by De Jure Clerk.* When a clerk in the office of the board of aldermen of the city of New York, who had been removed and another appointed in his place, was reinstated by mandamus because he had been removed without "an opportunity to present an explanation in writing," the city is not liable to such clerk for the salary of the position in question during the period between the date of his removal and the date of his reinstatement, where during that interval the salary of the position was paid to another, who, by an appointment regular upon its face, held the position, performed the duties thereof and was paid the compensation attached thereto. *Martin v. City of New York.* 371

6. *Power of New East River Bridge Commissioners — Ch. 789, L. 1895 — Provisions in Specifications Limiting Competition Neither Illegal nor Fraudulent.* General allegations in a taxpayer's action to annul a contract made by the commissioners of the New East River bridge in the city of New York for the construction of the bridge, that the commissioners fraudulently prescribed in their notices and specifications that proposals would be received from those bidders only who possessed plants requisite to do the work and whose plants had been in successful operation for at least one year, and that there would be excluded steel containing more than a specified percentage of foreign elements "with the purpose and intent of limiting competition and confining the same to a small class of bidders," and also charging that the cost of the work was increased thereby, in the absence of any allegations of fact except the statement that their action was taken with the purpose and intent of limiting the class of bidders, are insufficient to support the charge of fraud, since under the act directing the construction of the bridge (L. 1895, ch. 789, § 8) the power of the commissioners, which was not limited or qualified by subsequent charter provisions, was plenary and they were not limited to the performance of the work by contract or by competition, and, therefore, their intent to limit competition, both in the class of construction or as to character of material, was in itself neither illegal nor fraudulent. *Knowles v. City of New York.* 480

7. *Insertion of Invalid Provisions of Labor Law Does Not Render Contract Void.* The fact that the commissioners required the insertion of pro-

NEW YORK (CITY OF)—*Continued.*

visions of the Labor Law in the contract which were subsequently held invalid, even if their action was illegal, does not make it fraudulent, and the insertion of such provisions in the contract does not render it void assuming that they increased the cost of the work; the contract may be enforced, although but partially performed, especially as the commissioners, if the invalidity of such provisions avoided the contract, might have immediately, without competition or advertisement, entered into a new contract with the same contractor, and they, therefore, had power to waive illegal conditions and to continue the contract in force. *Id.*

8. *Private Use of Public Streets — Presumption Arising from Lapse of Time That User Is With Consent of the Public Authorities May Be Dispelled by Proof.* Where a vault has existed under a sidewalk for more than twenty years and no objection has been made, as between the owner and a third person, it will be presumed that it was originally constructed with the assent of the public authorities, and the same presumption will obtain as against a municipality if there is no proof to overcome it. This presumption is not that the owner or his grantors acquired any right to the use of the street by prescription or without the consent of the proper authorities, but that from such use it might be presumed that the proper consent was given. It is, however, a presumption only which may be dispelled by proof. It is not a presumption of a grant of the title or of a permanent right in the street, as no power exists in the authorities to make such a grant or to confer any such right. The title to the streets being in the city as trustee for the public, no grant or permission can be legally given which will interfere with their public use. The right of the public to the use of the streets is absolute and paramount to any other. A presumption of or even an actual consent by the authorities to their use for private purposes is always subject and subordinate to the right of the public whenever required for public purposes, and such a grant or right cannot be presumed when it would have been unlawful. *Dezhong v. City of New York.* 475

9. *Reconstruction of Vault Under Sidewalk — When Payment for Permit Involuntary.* A payment made by an abutting owner to municipal authorities for a permit to reconstruct a vault under a sidewalk in the city of New York, enforced by threats of arrest and by taking possession of his property, is, if such authorities had no authority to exact it, not so far voluntary as to prevent him from maintaining an action for its recovery. *Id.*

10. *When Reconstruction May Be Made Without Permit or Additional Compensation.* Assuming that a proper permit had been previously granted him for the construction of the old vault, such owner has the right to continue the new vault without an additional permit or further compensation, subject, however, to the condition that its continuance will not interfere with the street or impair its use by the public. *Id.*

11. *Collation of Statutes Relating to Use of Public Streets for Vaults.* Statutes relating to the use of public streets in the city of New York collated and discussed, showing that from 1857 there has been continuous authority in the boards and officers mentioned therein to give permits for building and repairing vaults, and that since 1859 such permits and the applications therefor have been required to be in writing and to be kept in the proper office. *Id.*

12. *When Presumption of Lawful User Is Dispelled by Proof — Question of Fact.* Where the plaintiff in such an action fails to prove the requisite written permit for the construction of the old vault, but relies upon the fact that it had been in existence since 1876, at least twenty-one years prior to the commencement of the action, without protest or interference from the city authorities, while a presumption is created that a permit was given by them, where there is proof that records of such permits were

NEW YORK (CITY OF) — Continued.

kept and that there was no record or index of any such permit in the proper office, the presumption is dispelled, or at least a question of fact arising upon conflicting evidence is presented, which if found against the plaintiff will preclude his recovery. *Id.*

Office of deputy tax commissioner excepted from provisions of Civil Service Law.

See CIVIL SERVICE.

Street improvement — when city not liable for damages caused by mistakes of city surveyor in fixing grades.

See CONTRACT.

Jurisdiction of magistrate in, to sentence women to state reformatory under section 146 of State Charities Law.

See CRIMES, 24.

Damages arising from negligence of contractor — bond to indemnify city — impairment of indemnitors' rights.

See PRINCIPAL AND SURETY.

Condemnation by, of rights of owners of waters of inland pond and rights of owners of land surrounding the pond and under waters of the same — when owner of bed of pond entitled to substantial damages.

See RIPARIAN RIGHTS, 8.

Effect of assessment made while proceeding for condemnation of property by city is pending — tax not a lien, when title passed to city before confirmation of assessment roll.

See TAX, 1.

Title to lands under water — title to lands in the public streets held in trust — rights of general public over places where land highways and navigable waters meet — power of legislature to prescribe that submerged land should be used for streets — conveyance by city of pier not a conveyance in fee of land covered by the pier — effect of covenants contained in prior deeds of adjoining land under water to same grantee — action predicated upon title in fee not maintainable.

See TITLE, 1-5.

NOTICE.

Check drawn by guardian is notice to payee that fund belongs to ward.

See GUARDIAN AND WARD.

OFFICERS.

Constitutional prohibition against use of free railroad passes by public officers applies to palace and sleeping car passes.

See CONSTITUTIONAL LAW, 1.

Invalidity of resolution of board of supervisors attempting to extend term of town officers.

See TOWNS.

PARENT AND CHILD.

1. *Misdemeanor — Unlawful Omission to Provide Medical Attendance for a Minor Child — When Indictment Therefor Sufficient — When Omission to Furnish Medical Attendance Is Unlawful.* An indictment under section 288 of the Penal Code, providing that "A person who, 1, willfully omits without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor * * * or, 4, neglects, refuses or omits to comply with any provisions of this section, * * * is guilty of a misdemeanor," which charges

PARENT AND CHILD — *Continued.*

that the defendant willfully, maliciously and unlawfully omitted, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his minor child, said minor being ill and suffering from catarrhal pneumonia, and that he willfully, maliciously and unlawfully neglected and refused to allow said minor to be attended and provided for by a regularly licensed and practicing physician, is not bad because it fails to allege that the case was one in which a regularly licensed and practicing physician should have been called, and, therefore, fails to charge a criminal offense, since that is necessarily implied from the language used; if the medical attendance was not necessary it was not a duty required of the defendant to furnish it; if it was necessary then it was his duty to furnish it and his failure to do so is an unlawful omission to perform a duty imposed, and constitutes a misdemeanor. *People v. Pierson.* 201

2. *Test of Necessity for Medical Attendance — Reasonable Discretion.* The necessary medical attendance required for the preservation of the health of the child does not contemplate the necessity of calling a physician for every trifling complaint with which the child may be afflicted, which in most instances may be overcome by the ordinary household nursing by members of the family; a reasonable amount of discretion is vested in persons upon whom the duty is imposed, and the standard is, at what time would an ordinarily prudent person, solicitous for the welfare of the child and anxious to promote its recovery, deem it necessary to call in the services of a physician. *Id.*

3. *Duty to Furnish Medical Attendance to Minor Child Imposed by Statute on Guardians, Parents and Those in Loco Parentis.* The phrase "a duty by law imposed" has reference to persons designated in the statutes and in the common law as parents, guardians or those who by adoption or otherwise have assumed the relation *in loco parentis*, and the character of the duties is specified in the section, and, therefore, assuming that such persons were not bound at common law to furnish medical attendance for minors, that duty is expressly provided for and is made obligatory upon them by the statute. *Id.*

4. *Meaning of "Medical Attendance."* The term "medical attendance" means attendance by a person who under the statute (L. 1880, ch. 513) is a regularly licensed physician, and does not include that by a layman who, because of his religious belief that prayer for Divine aid was the proper remedy for sickness, neglects to furnish proper medical attendance to a minor child who was dangerously ill. *Id.*

5. *Constitutional Guaranty of Freedom of Worship Not Violated by Statutory Requirement.* The constitutional guaranty of the full and free enjoyment of religious profession and worship (Const. art. 1, § 3) is not violated by the statute, since practices inconsistent with the peace and safety of the state are not justifiable, and the peace and safety of the state involves the protection of the lives and health of its children as well as obedience to its laws — the omission, therefore to afford this protection is a public wrong and properly punishable as such. *Id.*

PARTIES.

Board of education, not the city of New York, the proper party defendant in suits relating to school funds.

See NEW YORK (CITY OF), 1-3.

In actions for partition.

See PARTITION.

To proceeding for damages caused by change of grade in street.

See STREETS, 2.

PARTITION.

Parties. One claiming title in hostility to the plaintiff in an action of partition may properly be made a party defendant. *Wallace v. McEchron*, 424

PARTNERSHIP.

Action for damages will not lie between members of two firms having one member common to both — when firm not liable for false representations of partner.

See FALSE REPRESENTATIONS, 1, 2.

PASS.

Constitutional prohibition against use of free railroad passes by public officers applies to palace and sleeping car passes.

See CONSTITUTIONAL LAW, 1.

PAYMENT.

To foreign administrator after appointment of administrator in this state — when discharges debt.

See EXECUTORS AND ADMINISTRATORS.

When payment for permit to reconstruct a vault under a sidewalk involuntary.

See NEW YORK (CITY OF), 9.

PENAL CODE.

1. § 288 — *Misdemeanor — Unlawful Omission to Provide Medical Attendance for a Minor Child — When Indictment Therefor Sufficient — When Omission to Furnish Medical Attendance Is Unlawful.* An indictment under section 288 of the Penal Code, providing that "A person who, 1, willfully omits without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor * * * or, 4, neglects, refuses or omits to comply with any provisions of this section, * * * is guilty of a misdemeanor," which charges that the defendant willfully, maliciously and unlawfully omitted, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his minor child, said minor being ill and suffering from catarrhal pneumonia, and that he willfully, maliciously and unlawfully neglected and refused to allow said minor to be attended and provided for by a regularly licensed and practicing physician, is not bad because it fails to allege that the case was one in which a regularly licensed and practicing physician should have been called, and, therefore, fails to charge a criminal offense, since that is necessarily implied from the language used; if the medical attendance was not necessary it was not a duty required of the defendant to furnish it; if it was necessary, then it was his duty to furnish it, and his failure to do so is an unlawful omission to perform a duty imposed, and constitutes a misdemeanor. *People v. Pierson*, 201

2. § 842 — *Privilege of Witness.* Section 842 of the Penal Code, providing that "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding," is not coextensive with the constitutional provision and does not afford the witness the protection contemplated thereby, in that it does not prevent the use of evidence against him which may be obtained through his testimony, but simply excludes such testimony. *People ex rel. Lewisohn v. O'Brien*, 258

3. *Idem.* A witness produced by the prosecution before a magistrate on an information charging the defendant with keeping a gambling house, may properly refuse to answer questions as to whether he had ever been in the place in question, upon the ground that his answers might tend to

PENAL CODE — Continued.

incriminate him, since the statute does not afford him the full protection accorded by the constitutional provision. *Id.*

4. §§ 344a, 344b — *When Admission of Private Papers in Evidence Not Violative of Constitutional Guaranty Against Compelling Prisoner to Be a Witness Against Himself* — Const. Art. 1, § 6. The admission in evidence upon the trial of an indictment under section 344a of the Penal Code, relating to policy playing, of private papers and property belonging to the defendant, alleged to have been unlawfully seized by police officers and introduced by the prosecution for the purpose of establishing his handwriting on certain policy slips, and to show that the office in which they were found was occupied by him, does not compel him to become a witness against himself in violation of section 6 of article 1 of the Constitution of the state of New York. *People v. Adams.* 851

5. *Idem* — *Crimes — Policy Gambling — Constitutionality of Sections 344a and 344b of Penal Code — What Public Officers May Lawfully Be in Possession of Apparatus Used in Game of Policy.* Section 344a of the Penal Code, creating the crime of "policy" gambling and making it unlawful for any person to have in his possession the apparatus therefor, is not an unauthorized interference with the ownership of private property and is constitutional. Section 344b, making the possession by any person other than a public officer of such apparatus "presumptive evidence of possession thereof knowingly and in violation of" the preceding section, creates no offense, but simply prescribes a rule of evidence within the power of the Legislature, and is also constitutional. Neither section depends upon the other, each being complete in itself. The public officers intended to be excepted by the Legislature are those who, in the discharge of their official duties, are necessarily at times the custodians of the apparatus, and this provision, therefore, is not objectionable as class legislation. *Id.*

6. § 675 — *The State Charities Law — Jurisdiction of New York City Magistrate to Sentence Women to State Reformatory at Bedford under Section 146 Thereof — Conviction Must Be for Offenses Enumerated Therein.* Under section 146 of the State Charities Law (L. 1896, ch. 546, as amd. by L. 1899, ch. 632), providing that "A female, between the ages of fifteen and thirty years, convicted by any magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane, nor mentally or physically incapable of being substantially benefited by the discipline of either of such institutions, may be sentenced and committed to * * * the New York State Reformatory for Women at Bedford," a magistrate of the city of New York has no jurisdiction to sentence a woman to such reformatory unless she is convicted of one or more of the offenses enumerated therein, and a conviction thereunder is improper where it is impossible to determine, from the records and papers relating to the conviction and sentence returned upon writs of habeas corpus and certiorari allowed in her behalf, whether she was convicted of being a prostitute, either "public" or "common," assuming these terms to be practically synonymous, or on the charge of "disorderly conduct;" but, assuming that it is reasonably certain that the magistrate intended to convict the relator of "disorderly conduct," then the conviction is not a valid conviction for a misdemeanor, and, therefore, within the purview of the State Charities Law, unless the offense complained of constitutes a misdemeanor as defined by law; and where the record fails to show that the disorderly conduct complained of comes within the meaning of section 1458 of the Consolidation Act, which seems to have been incorporated into the Greater New York charter, or that of section 675 of the Penal Code, relating to the offense of disorderly conduct, so that it constitutes the offense of "disorderly conduct," as therein defined, and, therefore, is a misdemeanor, the relator is properly discharged from custody. *People ex rel. Clark v. Keeper, etc.* 465

PENAL CODE—Continued.

7. § 687a—*Constitutionality of Indeterminate Sentence Law.* Section 687a of the Penal Code, fixing a maximum and minimum sentence for prisoners, must be considered in connection with the law relating to prisons, permitting the parole of such prisoners, is a merciful exercise of legislative power and is constitutional. *People v. Adams.* 351

PERSONAL RIGHTS.

Witness in any criminal case not compelled to give any evidence against himself.

See CONSTITUTIONAL LAW, 2-4.

PHYSICIANS AND SURGEONS.

"Medical attendance" means attendance by a regularly licensed physician.

See PARENT AND CHILD, 4.

PIERS.

Conveyance by the city of New York of pier not a conveyance in fee of land covered by the pier.

See TITLE, 5.

PLEADING.

Insufficiency of General Allegation of Fraud. General allegations of fraud are of no value in stating a cause of action; the facts or intent must be stated in such a manner that the court may see whether they were fraudulent or not. *Knowles v. City of New York.* 430

POLICY.

Gambling — trial of indictment for.

See CRIMES, 18-23.

Of title insurance — reformation.

See INSURANCE, 1-8.

Of life insurance — restriction of power of agents to waive conditions.

See INSURANCE, 4-6.

POWERS.

Section 220 of Tax Law, imposing transfer tax upon the exercise of a power of appointment, constitutional.

See TAX, 4, 5.

PRACTICE.

1. *Continuance of Action in State Court Against Receivers Appointed by Federal Court after Their Discharge—Code Civ. Pro. § 756.* An action against railroad receivers appointed by a federal court brought in the Supreme Court of the state of New York under the Revised Statutes of the United States, authorizing the bringing of actions without previous leave of the court against a receiver appointed by a federal court in respect to any act or transaction of his in carrying on the business connected with the property, is not necessarily terminated as to them by their subsequent discharge and the transfer of the property pursuant to a decree of foreclosure and sale made by the federal court, and the plaintiff is not obliged to substitute the purchaser thereunder as defendant before proceeding to judgment; under section 756 of the Code of Civil Procedure, in case of a devolution of liability, the court may substitute the party upon whom the liability is devolved, but when it does not, the action is properly continued against the original parties. *Baer v. McCullough.* 97

2. *Same.* The fact that the statute authorizing the bringing of the action contains the provision, "But such suit shall be subject to the general equity jurisdiction of the court in which such receiver was

PRACTICE — Continued.

appointed," does not require the discontinuance of the action against the receivers after their discharge, upon the ground that the federal court having provided by the decree a method for establishing claims against the fund that was in the hands of the receivers, that method is exclusive; since Congress intended to permit claims to be established through the ordinary local judicial machinery, although their payment must be decreed by the federal court alone, especially in a case where the decree makes no provision that the method therein provided is exclusive and assures all the creditors that their claims, whether established or not at the time of the sale of the property, shall be paid. *Id.*

Election of remedies.

See ASSIGNMENT, 1, 2.

What costs may be recovered by landowner successfully defending condemnation proceeding.

See COSTS.

Erroneous direction of sale by referee.

See DECEDENT'S ESTATE, 5.

Action to foreclose mechanic's lien — when action commenced within one year after filing lien is dismissed for lack of evidence a new action may be commenced within one year after final determination of first action.

See LIENS.

When question whether judgment for money may be recovered is dependent upon decision of equitable questions the issue is not triable by jury as a matter of right.

See TRIAL, 3.

PRESUMPTIONS.

Presumption of lawful user may be dispelled by proof.

See NEW YORK (CITY OF), 8-12.

PRINCIPAL AND AGENT.

Liability of husband for goods purchased by wife — wife's agency a question of fact.

See HUSBAND AND WIFE.

Restriction of powers of life insurance agents.

See INSURANCE, 4-6.

PRINCIPAL AND SURETY.

Impairment of Indemnitor's Rights — Question of Fact. In an action upon a bond given to the city of New York as a substitute for moneys retained by the comptroller under a contract for laying water mains, to meet claims for damages which might arise from the negligence of the contractor, it appeared that a judgment based upon his negligence had been obtained against the city and the contractor; that both appealed; that thereafter the city, against his protest, settled by paying less than the amount of the judgment, but left it intact as to him, of all of which the surety had no notice, nor was it given an opportunity to say whether it would further indemnify the city on the condition that it would either prosecute the appeal or permit the surety to do so; that the reason given for the city's action was that while counsel believed there might be a reversal, he believed there would be another recovery in as great if not greater amount, and he deemed it wise to secure a reduction as the bond secured less than half of the amount of the judgment. It also appeared that after the settlement the city brought an action on a bond executed by the contractor at the time of the contract and conditioned for its faithful

PRINCIPAL AND SURETY — *Continued.*

performance in which it sought to recover the full amount paid in settlement of the judgment, which action was still pending. *Held*, that it was a question of fact, 1, whether or not the settlement was made in bad faith. 2. If so made, did it operate to the injury of the principal and surety? If made in bad faith with the intention of injuring the principal and surety, the plaintiff cannot recover unless it shows that its action did not operate to the disadvantage of either, or if it did to some extent, that, after deducting the amount of damage done to them, there still remained something due on the bond. A judgment of the Appellate Division, therefore, which reverses an order setting aside a verdict directed in plaintiff's favor and restores the original judgment entered thereon must be reversed and a new trial granted in order that the defendants may have an opportunity of presenting these questions to a jury. *City of New York v. Baird.* 269

PROCESS.

Failure to legally serve non-resident devisee with process in creditor's action to compel sale of decedent's real property for payment of debts fatal to judgment.

See DECEDENT'S ESTATE, 4.

PROSTITUTION.

Jurisdiction of magistrate to sentence woman to state reformatory under section 146 of State Charities Law.

See CRIMES, 24.

RAILROADS.

Measure of damages where a portion of a tract of land is taken for use of railroad.

See EMINENT DOMAIN.

Power of commissioners under grade crossing acts to change general plan.

See BUFFALO (CITY OF).

Constitutional prohibition against use of free railroad passes by public officers applies to palace and sleeping car passes.

See CONSTITUTIONAL LAW, 1.

Railroad company entitled to be made a party to proceeding for damages caused by change of grade in street owing to alteration of crossing.

See STREETS, 2.

REAL PROPERTY.

When purchase-money mortgage not champertous.

See CHAMPERTY.

Creditor's action to compel executor to sell real estate under power of sale for payment of debts.

See DECEDENT'S ESTATE, 1-5.

Grant obtained by fraud — when plaintiff may attack its validity although negligent in failing to read it.

See EJECTMENT, 1, 2.

When a deed of land bounded by and surrounding inland pond does not convey the land under waters of the pond — when conveys easement or right to overflow such land with waters collected and stored by dam leaving title and benefits thereof in grantor — effect of agreement by grantor to buy back easement if not used by grantee — condemnation of rights of owners — when owner of bed of pond entitled to substantial damages therefor.

See RIPARIAN RIGHTS, 1-3.

REAL PROPERTY — *Continued.*

Effect of assessment made while proceeding for condemnation of property by city is pending.

See TAX, 1.

When state tax deed void for failure of comptroller to give statement of unpaid taxes on land when requested by owner.

See TAX, 2, 3.

RECEIVERS.

Appointed by federal court — continuance of action in state court against, after their discharge.

See PRACTICE, 1, 2.

REFEREES.

Disqualification — judicial notice of population of county.

See TRIAL, 2.

REMEDIES.

Election of.

See ASSIGNMENT, 1, 2.

RES ADJUDICATA.

When creditor not barred from taking under assignment by judgment in action by him to set it aside.

See ASSIGNMENT, 2.

RETURN.

To certiorari to review determination of town board made by majority of board is conclusive.

See CERTIORARI.

REVERSAL.

When erroneous rulings on trial will not justify.

See APPEAL, 1.

REVISED STATUTES.

1 R. S. 739, §§ 147, 148 — *Champerly* — *When Purchase-Money Mortgage Not Champertous.* Judicial sales are not within the condemnation of the Statute of Champerty (1 R. S. 739, §§ 147, 148; Real Property Law, 1895, ch. 547, § 225); a purchaser of land sold under a decree in a foreclosure action acquires a perfect title, although at the time the premises are in the actual possession of one claiming title thereto under a tax deed; a mortgage executed by him on the same day to the plaintiff to secure a part of the purchase price is not void under the statute since the deed and the mortgage take effect at the same instant, constituting but one act, and the mortgagee, to the extent of his mortgaged interest, whether it be considered a lien or a conditional estate, must be regarded as much a purchaser at the judicial sale as the mortgagor, and acquires the title not from him but through him as a mere conduit; the assignee of such purchase-money mortgage who forecloses it and bids in the premises acquires the title thereto and may maintain an action of ejectment for their recovery. *De Garmo v. Phelps.* 455

REVIVAL.

Continuance of action in state court against receivers appointed by federal court after their discharge.

See PRACTICE, 1, 2.

RIPARIAN RIGHTS.

1. *When a Deed of Land Bounded by, and Surrounding, Inland Pond Does Not Convey the Land under Waters of the Pond.* Where the owner of a pond, or a portion thereof, and of the lands surrounding the same, executed and delivered to the owner of a mill site upon a river through

RIPARIAN RIGHTS — *Continued.*

which flowed the waters from the pond, a deed containing a description bounding all of the lands surrounding the pond owned by the grantor, followed by the words "being all the land on both sides of Byram River and Byram Pond that will be overflowed by the waters of Byram River and Byram Pond in consequence of the erection of a dam across said Byram River, southerly of lands hereby conveyed, of sufficient height to raise the waters in Byram Pond eight feet and two-tenths above its present level and the above-described land is conveyed * * * only for the purpose of being flowed by said pond," which deed was followed by another from the same grantor to the same grantee containing substantially the same description and provisions contained in the former deed, with the exception that it gives the right to raise the water of the pond twelve feet instead of eight; such deeds convey the and on the sides of the pond for flowage purposes only, not that of the pond itself, i. e., the land bordering upon and bounded by the waters of the pond which might be overflowed by the raising of the dam, leaving the title to the land then under the waters of the pond remaining in the grantor. *Matter of Brookfield.* 138

2. *When Deed of Land Surrounding Pond Conveys Easement, or Right, to Overflow Such Land with Waters Collected and Stored by Dam, Leaving Title and Benefits Thereof in Grantor — Effect of Agreement by Grantor to Buy Back Easement if Not Used by Grantee.* The ordinary and formal parts of such deeds, in terms including all hereditaments and appurtenances belonging to the land thereby conveyed, must be construed with the provision limiting the land conveyed to "all the land on both sides of Byram River and Byram Pond that will be overflowed * * * in consequence of the erection of the dam across said Byram River," and with the provision that the land is conveyed "only for the purpose of being flowed by said pond," which provisions are the essential features, the real essence of the contract, and should be given force and effect in preference to such formal parts; so construed, the deeds conveyed to the grantee a mere easement to have the waters collected by the dam overflow such land, leaving the fee, possession and use thereof, in connection with the upland, in the grantor, subject only to such right of flowage; and a subsequent provision of such deeds that in case the grantee should not use the land thereby conveyed for flowage purposes, then the grantor, his heirs and assigns, should buy back such lands at a price to be agreed upon, or settled by arbitration, is not a condition subsequent to the revesting of the title in the grantor, but is a mutual agreement of the parties which could be enforced by either and does not affect the question as to the interest or title conveyed by the deeds. *Id.*

3. *Condemnation of Rights of Owners of Waters of Inland Pond and Rights of Owners of Land Surrounding the Pond and under Waters of the Same in Proceeding by City of New York under Chapter 189 of Laws of 1893 — When Owner of Bed of Pond Entitled to Substantial Damages Therefor.* Where the city of New York, in a condemnation proceeding instituted under the statute (L. 1893, ch. 189), providing for the protection of the sources of its water supply, has acquired the right of the grantee named in the deeds in question to maintain the dam across Byram river and use the waters collected and stored therein, and has also acquired from the successor in title of the grantor named in such deeds the title to the lands surrounding Byram pond, for which the commissioners of appraisal awarded substantial damages, but awarded only nominal damages for the bed of the pond, he is entitled to a new appraisal awarding him substantial compensation for his right to use the pond in connection with the upland for domestic purposes, the harvesting of ice, etc., and also for his right to repurchase his interest in the lands surrounding the pond as provided for in the deeds, since such rights are real, entitling him to substantial damages upon their being taken from him, pursuant to the provisions of the act under which the condemnation proceedings were instituted. *Id.*

ROCHESTER (CITY OF).

Water company incorporated for the purpose of supplying water to towns and villages adjacent to city—when it may lay its water mains and pipes through city.

See WATER WORKS, 1-6.

SALARIES.

When payment to *de facto* clerk is a defense to action for salary by *de jure* clerk.

See NEW YORK (CITY OF), 5.

SALE.

Judicial sales not within condemnation of Statute of Champerty.

See CHAMPERTY.

When firm not liable for false representations of partner.

See FALSE REPRESENTATIONS, 1, 2.

SCHOOLS.

In New York city—board of education, not the city, the proper party defendant in suits relating to school funds.

See NEW YORK (CITY OF), 1-8.

SEARCH WARRANT.

When evidence of non-existence of, immaterial.

See CRIMES, 28.

SERVICES.

When payment to *de facto* clerk is a defense to action for salary by *de jure* clerk.

See NEW YORK (CITY OF), 5.

SESSION LAWS.

1779, *Ch.* 81. See par. 9, this title.

1797, *Ch.* 48. See par. 9, this title.

1. 1807, *Ch.* 115—*New York City—Title to Lands Under Water.* The title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and acts of the legislature (L. 1807, ch. 115; L. 1826, ch. 58; L. 1887, ch. 182) was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. *Knickerbocker Ice Co. v. Forty-second St., etc., R. R. Co.* 408

1818, *Ch.* 83. See par. 9, this title.

1817, *Ch.* 88. See par. 9, this title.

1826, *Ch.* 58. See par. 1, this title.

2. 1887, *Ch.* 182—*Power of Legislature to Prescribe that Submerged Lands Should Be Used for Streets.* The legislature had the power in granting submerged lands to the city of New York (L. 1887, ch. 182) to prescribe that such lands should be used for the purpose of an exterior street to which other streets then intersecting the river should be extended. *Knickerbocker Ice Co. v. Forty-second St., etc., R. R. Co.* 408

See, also, par. 1, this title.

3. 1880, *Ch.* 518—*Meaning of "Medical Attendance."* The term "medical attendance" means attendance by a person who under the statute (L. 1880, ch. 518) is a regularly licensed physician, and does not include that by a layman who, because of his religious belief that prayer for Divine

SESSION LAWS — Continued.

aid was the proper remedy for sickness, neglects to furnish proper medical attendance to a minor child who was dangerously ill. *People v. Pier-son*. 201

1882, *Ch.* 317. See par. 9, this title.

1883, *Ch.* 410. See par. 14, this title.

4. 1883, *Ch.* 113 — *Streets — Change of Grade — Proceedings for Damages Caused Thereby — Construction of Statutes Relating Thereto.* The statute (L. 1883, ch. 113, as amd. by L. 1884, ch. 281, and L. 1894, ch. 172) providing that "whenever the grade of any street * * * in any incorporated village shall be changed so as to injure or damage the buildings or real property adjoining such highway, the owners thereof may apply to the Supreme Court for the appointment of three commissioners to ascertain and determine their damages, which damages shall be a charge upon the village * * * chargeable with the maintenance of the street * * * so altered or changed," was not superseded or repealed by the provisions of the Village Law (L. 1897, ch. 414, § 159, and § 342, subd. 4), providing for the assessment and payment of damages when the grade of a street shall be changed by the authorities of a village having the exclusive control and jurisdiction of the street, except in so far as the provisions of the former statute might apply to a change of the grade of a street, within the exclusive control and jurisdiction of a village, when made by the legally constituted authorities thereof. *Matter of Torge v. Vil. of Salamanca*. 824

5. *Idem — Same — When Proceeding for Damages Caused by Change of Grade in Street May Be Instituted and Maintained — Parties to Such Proceeding.* Where a railroad crossing over a village street was changed from a grade to an undergrade crossing by the railway company and the authorities of the village, pursuant to an order of the board of railroad commissioners, acting under the provisions of the Railroad Law relating to the change of railroad crossings at grade, in furtherance of public safety (L. 1890, ch. 565, §§ 62-69), whereby an alteration of the grade of the street in front of property abutting thereon was rendered necessary, the owner of the property may institute and maintain a proceeding for the damages caused by such alteration under chapter 113, Laws of 1883, since all that is necessary to bring the case within this statute is that the grade shall be legally changed or altered; but, as the damages for which recovery is sought were caused by an improvement toward the expense of which the railroad company is required to contribute its ratable proportion, the company is entitled to be made a party to the proceeding, and to be heard therein, as provided by the Railroad Law. *Id.*

1884, *Ch.* 281. See par. 4, this title.

6. 1888, *Ch.* 345 — *Buffalo Grade Crossing Act — Power of Commissioners under Grade Crossing Acts to Change General Plan.* Under the Buffalo Grade Crossing Acts (L. 1888, ch. 345; L. 1890, ch. 255; L. 1893, ch. 353) providing that: 1. The general plan to be adopted may be amended only in matters of detail. 2. It shall not be extended beyond the general plan heretofore adopted under which contracts have been entered into. 3. Contracts heretofore or hereafter made with railroad companies may be changed by agreement between the contracting parties, but not otherwise — where the commissioners in March, 1893, adopted a general plan which provided for no change in the grade of a railroad running through the city as then constructed and operated, they cannot compel the railroad company to change the elevation of its tracks and reconstruct its terminal structures, sidings and switches to comply with a plan proposed and

SESSION LAWS — Continued.

adopted in 1899, which is an extension of the general plan of 1893, and not a modification, in some details, of that plan. *Lehigh Valley Ry. Co. v. Adam.* 420

1890, *Ch.* 255. See par. 6, this title.

1890, *Ch.* 565. See par. 5, this title.

7. 1890, *Ch.* 566 — *Transportation Corporations Law — Water Company Incorporated for the Purpose of Supplying Water to Towns and Villages Adjacent to a City — When It May Lay Its Water Mains and Pipes through the City — When Entitled to Injunction Restraining the City from Preventing the Laying of Water Pipes.* Where a water works company, duly incorporated under the provisions of the Transportation Corporations Act (L. 1890, ch. 566, as amd. by L. 1892, ch. 617), for the purpose of supplying water to certain villages and towns lying upon opposite sides of a city, has paid the organization charges imposed by the statute and has located and procured a right of way through the towns lying on the westerly side of the city, as required by the statute, and has obtained by a contract with a railroad company the right to lay its water mains upon the railroad's right of way through the city and the town on the easterly side of the city to villages upon the line of the railroad, and has also entered into a contract with another corporation to construct its water plant and lay its water mains and pipes, and made agreements to supply water to a number of manufacturing establishments in the towns, outside of the city, and to supply the railroad company with the water that it requires in the city and at its stations along the route of the water company, the franchise rights of the water company have become vested thereby, and the company has the right and power, under section 82 of the statute, to lay its water mains along the route which it has adopted and located upon the railroad's right of way through the city, without the consent or permission of the authorities of the city, and is entitled to an injunction restraining the city, its officers, agents and servants, from interfering with or preventing it from laying its water pipes or mains across the streets of the city intersected by the railroad's right of way. *Rochester & L. O. Water Co. v. City of Rochester.* 36

8. *Idem* — *When Ordinances Adopted under Provisions of the Charter of the City Have no Application to the Laying of Water Mains through the City — When Superintendent of Water Works of City May Not Interfere With Water Pipes and Mains Passing through the City — Effect of Statutes Enacted after Water Company's Rights Have Been Acquired.* Ordinances adopted by the common council of a city, after the passage of the Transportation Corporations Law, for the purpose of regulating the opening of street surfaces for the laying of gas and water pipes and the making of sewer connections, although authorized by the charter of the city, have no application to and cannot regulate or prohibit the laying of water mains through the city by a water company organized under the statute in question for the purpose of supplying water to adjacent towns and villages, since the legislature could not have intended to vest in the common council the right to repeal or amend, by ordinance, a general statute of the state; neither do the provisions of the charter of cities of the second class (L. 1898, ch. 182) under which, in connection with special statutes not inconsistent therewith, the city, in this case, is now acting and by which the commissioner of public works is empowered to appoint a superintendent of water works to see that the city is supplied with wholesome water for public and private use, give such superintendent any power to prohibit the laying of water pipes under the general laws or control the water of a corporation organized under the Transportation Corporations Law so long as it is only passing through the city in the mains of the company for use elsewhere; nor can the vested rights acquired by the company in pursuance of its

SESSION LAWS — Continued.

corporate purposes be affected by subsequent statutes enacted for the purpose of preventing the company from laying its pipes within the territory of the city. *Id.*

1892, *Ch.* 353. See par. 6, this title.

1892, *Ch.* 617. See par. 7, this title.

9. 1892, *Ch.* 686 — *County Law — Power of Town Officers of Town of Hyde Park Not Restricted or Affected by Section 77 of the County Law, Relating to the Alteration of State Roads.* The power of the town board and highway commissioners of the town of Hyde Park to authorize an alteration and improvement in the New York and Albany post road is not restricted or made dependent upon the consent of the board of supervisors of Dutchess county by the provisions of section 77 of the County Law (L. 1892, ch. 686), providing that the board of supervisors of any county may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state, since it is apparent, from an examination of the Colonial Laws (Col. Laws, 1703, ch. 131; 1772, ch. 1596), and the statutes of the state (L. 1779, ch. 81; L. 1797, ch. 43; L. 1813, ch. 33), relating to the laying out, construction and maintenance of the New York and Albany post road and other public highways established prior to 1813, that under the colonial laws as early as 1772, especially in Dutchess county, where the alteration in question was made, commissioners of highways were empowered to alter highways that were deemed inconvenient, and that this power was continued by the state legislature in 1779 and by general laws in 1797 and 1813, and that the same power has been continued until the present day; it follows, therefore, that at the time of the passage of the County Law and of chapter 317 of the Laws of 1892, and even of chapter 83 of the Laws of 1817, the substance of which statutes is contained in section 77 of the County Law, the commissioners of highways of towns had been given jurisdiction over the existing colonial highways, with the power to make such needed alterations therein as should be deemed necessary, and that power has not been taken from them by the County Law. *People ex rel. Dinamore v. Vandewater.* 500

1892, *Ch.* 690. See par. 23, this title.

10. 1893, *Ch.* 189 — *Condemnation of Rights of Owners of Waters of Inland Pond and Rights of Owners of Land Surrounding the Pond and under Waters of the Same in Proceeding by City of New York — When Owner of Bed of Pond Entitled to Substantial Damages Therefor.* Where the city of New York, in a condemnation proceeding instituted under the statute (L. 1893, ch. 189), providing for the protection of the sources of its water supply, has acquired the right of the grantee named in certain deeds to maintain a dam across Byram river and use the waters collected and stored therein, and has also acquired from the successor in title of the grantor named in such deeds the title to the lands surrounding Byram pond, for which the commissioners of appraisal awarded substantial damages, but awarded only nominal damages for the bed of the pond, he is entitled to a new appraisal awarding him substantial compensation for his right to use the pond in connection with the upland for domestic purposes, the harvesting of ice, etc., and also for his right to repurchase his interest in the lands surrounding the pond as provided for in the deeds, since such rights are real, entitling him to substantial damages upon their being taken from him, pursuant to the provisions of the act under which the condemnation proceedings were instituted. *Matter of Brookfield.* 183

1893, *Ch.* 725. See par. 23, this title.

1894, *Ch.* 172. See par. 4, this title.

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11. 1895, *Ch. 547—Real Property Law—Champerty—When Purchase-Money Mortgage Not Champertous.* Judicial sales are not within the condemnation of the Statute of Champerty (1 R. S. 789, §§ 147, 148; Real Property Law, 1895, ch. 547, § 225); a purchaser of land sold under a decree in a foreclosure action acquires a perfect title, although at the time the premises are in the actual possession of one claiming title thereto under a tax deed; a mortgage executed by him on the same day to the plaintiff to secure a part of the purchase price is not void under the statute since the deed and the mortgage take effect at the same instant, constituting but one act, and the mortgagee, to the extent of his mortgaged interest, whether it be considered a lien or a conditional estate, must be regarded as much a purchaser at the judicial sale as the mortgagor, and acquires the title not from him but through him as a mere conduit; the assignee of such purchase-money mortgage who forecloses it and bids in the premises acquires the title thereto and may maintain an action of ejectment for their recovery. *De Garmo v. Phelps.* 455

See, also, par. 15, this title.

12. 1895, *Ch. 789—New York City—Power of New East River Bridge Commissioners—Provisions in Specifications Limiting Competition Neither Illegal nor Fraudulent.* General allegations in a taxpayer's action to annul a contract made by the commissioners of the New East River bridge in the city of New York for the construction of the bridge, that the commissioners fraudulently prescribed in their notices and specifications that proposals would be received from those bidders only who possessed plants requisite to do the work and whose plants had been in successful operation for at least one year, and that there would be excluded steel containing more than a specified percentage of foreign elements "with the purpose and intent of limiting competition and confining the same to a small class of bidders," and also charging that the cost of the work was increased thereby, in the absence of any allegations of fact except the statement that their action was taken with the purpose and intent of limiting the class of bidders, are insufficient to support the charge of fraud, since under the act directing the construction of the bridge (L. 1895, ch. 789, § 3) the power of the commissioners, which was not limited or qualified by subsequent charter provisions, was plenary and they were not limited to the performance of the work by contract or by competition, and, therefore, their intent to limit competition, both in the class of construction or as to character of material, was in itself neither illegal nor fraudulent. *Knowles v. City of New York.* 480

13. 1896, *Ch. 423—Highways—New York and Albany Post Road—Power of Town Officers of Town of Hyde Park to Alter and Improve Same.* The town board and commissioners of highways of the town of Hyde Park, Dutchess county, having had, under colonial laws and statutes of the state prior to the enactment of chapter 423 of the Laws of 1896, the power to alter and improve the New York and Albany post road, running through that town, such power is not restricted or taken away by the latter act, since there is nothing in the provisions thereof that in any manner limits their jurisdiction or powers over that highway, except in one particular, that they are prohibited thereby from authorizing or licensing the laying of any railroad track upon the highway, except to cross the same; they have, therefore, the power, upon the petition of a taxpayer of the town, to authorize an alteration and improvement of a part of said road, lying within the town and within the premises of the petitioner, such improvement to be made by petitioner and at his expense, and upon the satisfactory completion thereof, to accept the road as changed and improved. *People ex rel. Dinmore v. Vandewater.* 500

14. 1896, *Ch. 546—State Charities Law—Jurisdiction of New York City Magistrate to Sentence Women to State Reformatory at Bedford*

SESSION LAWS — Continued.

under Section 146 Thereof — Conviction Must Be for Offenses Enumerated Therein. Under section 146 of the State Charities Law (L. 1896, ch. 546, as amd. by L. 1899, ch. 632), providing that "A female between the ages of fifteen and thirty years, convicted by any magistrate of petit larceny, habitual drunkenness, of being a common prostitute, of frequenting disorderly houses or houses of prostitution, or of a misdemeanor, and who is not insane, nor mentally or physically incapable of being substantially benefited by the discipline of either of such institutions, may be sentenced and committed to * * * the New York State Reformatory for Women at Bedford," a magistrate of the city of New York has no jurisdiction to sentence a woman to such reformatory unless she is convicted of one or more of the offenses enumerated therein; and a conviction thereunder is improper where it is impossible to determine, from the records and papers relating to the conviction and sentence returned upon writs of habeas corpus and certiorari allowed in her behalf, whether she was convicted of being a prostitute, either "public" or "common," assuming these terms to be practically synonymous, or on the charge of "disorderly conduct;" but assuming that it is reasonably certain that the magistrate intended to convict the relator of "disorderly conduct," then the conviction is not a valid conviction for a misdemeanor, and, therefore, within the purview of the State Charities Law, unless the offense complained of constitutes a misdemeanor as defined by law; and where the record fails to show that the disorderly conduct complained of comes within the meaning of section 1458 of the Consolidation Act, which seems to have been incorporated into the Greater New York charter, or that of section 675 of the Penal Code, relating to the offense of disorderly conduct, so that it constitutes the offense of "disorderly conduct," as therein defined, and, therefore, is a misdemeanor, the relator is properly discharged from custody. *People ex rel. Clark v. Keeper, etc.*
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15. 1896, Ch. 547 — *Will — When Void Intermediate Trust, Created by Codicil, May Be Expunged Without Changing Testator's Plan for Disposition of His Property, the Will Must Be Sustained.* Where a testator devised and bequeathed his residuary estate to his executors in trust to pay the income thereof to his wife during her lifetime, with power to sell his real estate at any time during the trust at their discretion, and after her death to transfer the residuary estate to the designated trustees of a permanent trust, and thereafter, after the death of his wife, testator executed a codicil to his will, revoking the provisions therein contained for the benefit of his wife, and directing his executors to hold the residuary estate and invest and reinvest the income thereof until the expiration of two years after his death and then to transfer the residuary estate and the accumulated income thereof to the trustees of the permanent trust, neither the will and the provisions thereof granting the power of sale, nor the provisions creating the permanent trust, are revoked or rendered invalid by the codicil, notwithstanding the direction to hold and invest both principal and income of the residuary estate for the definite period of two years after testator's death before transferring the same to the permanent trustees constituted an unlawful suspension of the power of alienation and provided for the unlawful accumulation of income in violation of the statute (Real Property Law, §§ 32 and 51; L. 1896, ch. 547), since the invalid provisions of the codicil affected neither the power of sale nor the existence of the permanent trust, but only the time of the inception of the trust, and such provisions can be expunged without making any change in the testator's plan for the disposition of his residuary estate, except that the trustees of the permanent trust take possession thereof upon the testator's death instead of two years later. *Smith v. Oheebrough.*
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16. 1896, Ch. 769 — *Appraisal of Property of Water Works Company Made by Commissioners in Condemnation Proceedings — Illegal*

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and Erroneous When Based upon Invalid Contract of Purchase. Where the board of water commissioners of the village of White Plains, appointed by the statute (L. 1896, ch. 769), with power to supply the village with water and to acquire by purchase or condemnation all water, water rights and property necessary therefor, whether owned by individuals or water companies, instituted condemnation proceedings pursuant to such statute to acquire the property of a water works company then supplying the village with water under the contract of July 1, 1886, and the commissioners appointed in such proceeding instead of appraising such property, including the good will and franchise of the company, at its full value, as provided by the statute, refused to be governed thereby and determined the value of the real property and plant of the company in the manner provided for by the contract of July 1, 1886, without any award for the franchise rights of the company, such determination and award are illegal and erroneous and must be set aside and a new appraisal ordered before new commissioners to be appointed by the court. *Matter of Bd. of Water Comrs. of White Plains.* 239

17. 1896, Ch. 908 — *Tax Law — Evidence — Competency of Tax Deed.* Under section 132 of the Tax Law (L. 1896, ch. 908) a tax deed executed by a county treasurer which has for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, is admissible in evidence without proof of the regularity of the proceedings upon which it is based. *Baer v. McCullough.* 97

18. *Idem* — *Section 132 of the Tax Law Relating to Effect of Former Deeds Not Applicable.* Section 132 of the Tax Law (L. 1896, ch. 908) providing that a comptroller's deed which has been recorded for two years shall be conclusive evidence that a sale and proceedings prior thereto were regular and that conveyances shall be subject to cancellation, (1) by reason of the payment of such taxes; (2) by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid; (3) by reason of any defect affecting the jurisdiction upon constitutional grounds, if application is made to the comptroller or an action is brought, in the case of all sales made prior to 1895, within one year from the passage of the act, is not applicable to such a case whether treated as a statute of limitation or as a curative act, and, therefore, the fact that the owner failed to apply for a cancellation or to bring an action within the prescribed time, does not preclude him from thereafter asserting his title in an action for a partition of the property. *Wallace v. McEchron.* 434

19. *Idem* — *Section 220 — Imposing Transfer Tax upon the Exercise of a Power of Appointment, Constitutional.* Subdivision 5 of section 220 of the Tax Law (L. 1896, ch. 908, amd. L. 1897, ch. 284), imposing a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, * * *" is an exercise of legislative power not prohibited by the State or Federal Constitution. A transfer tax is, therefore, properly imposed upon the exercise, by a last will and testament, of a power of appointment derived from a deed executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent. *Matter of Delano.* 486

20. *Idem* — *Construction of Statute.* The statute applies to all powers of appointment alike, without distinction on account of the method of creation or date of creation. No tax is laid upon the powers, or on the prop-

SESSION LAWS — *Continued.*

erty or on the original disposition by deed, but simply upon the exercise of the power by will as an effective transfer for the purposes of the act; and since the legislature has full and complete control of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will. The fact that there was no statute imposing a succession tax when the power was created is immaterial. That transfer is not taxed; it is the practical transfer through the exercise of the power by will that is taxed, and nothing else. *Id.*

See, also, par. 23, this title.

1897, *Ch.* 284. See pars. 19 and 20, this title.

1897, *Ch.* 414. See par. 4, this title.

1898, *Ch.* 182. See par. 8, this title.

21. 1898, *Ch.* 199 — *Little Falls Charter — Validity of Provisions Prohibiting Maintenance of Actions to Set Aside or Annul Assessments for Local Improvements Unless Commenced within Prescribed Time and in Compliance with Prescribed Conditions.* The legislature having power to absolutely prohibit an action to set aside, cancel or annul any assessment made for a local improvement, such power necessarily includes the power to prohibit the commencement of such an action unless specified conditions are complied with; it, therefore, had the power to enact the provisions of the charter of the city of Little Falls (*L.* 1898, ch. 199, § 83, as amd. by *L.* 1899, ch. 289), providing that no such action shall be maintained by any person unless "commenced within thirty days after the delivery of the assessment roll and warrant for such local improvement to the city treasurer and notice by him in the official newspapers of the city of the receipt thereof, and unless within said thirty days an injunction shall have been procured by such person from a court of competent jurisdiction restraining the common council from issuing the assessment bonds hereinafter provided to be issued for such assessment," and such provision is valid and is a bar to any action not commenced within the time, and in compliance with the conditions, therein prescribed. *Loomis v. City of Little Falls.* 81

1899, *Ch.* 289. See par. 21, this title.

22. 1899, *Ch.* 370 — *Civil Service Law — New York (City of) — Deputy Tax Commissioner — Office of, Excepted from Provisions of Section 21 of Civil Service Law Prohibiting Removal of Honorably Discharged Volunteer Firemen Therefrom, Except After Hearing on Stated Charges.* The office of deputy tax commissioner of the city of New York is an office excepted, by the language thereof, from the provisions of the Civil Service Law (*L.* 1899, ch. 370, § 21, as amd. by *L.* 1902, ch. 270) prohibiting the removal of an honorably discharged soldier or volunteer fireman from any position, by appointment or employment, in the state or any of the cities thereof, except for incompetency or misconduct after a hearing upon stated charges, and, therefore, an honorably discharged volunteer fireman who has been removed by the board of tax commissioners without a trial, having been first given an opportunity of making an explanation, under the provisions of section 1543 of the charter, is not entitled to a hearing upon stated charges, and a writ of certiorari to review his removal will not lie. *People ex rel. Ryan v. Wells.* 462

1899, *Ch.* 632. See par. 14, this title.

1900, *Ch.* 374. See par. 24, this title.

23. 1901, *Ch.* 118 — *Tax Law — Foreign Insurance Corporation — Franchise Tax upon Fire and Marine Insurance Corporation.* A foreign marine insurance company doing business in this state must pay the annual tax of five-tenths of one per centum on the gross amount of premiums received for business done within this state during each calendar year, imposed by chapter 118 of the Laws of 1901, amending section 187 of the

SESSION LAWS — *Continued.*

Tax Law (L. 1896, ch. 908, § 187), "in addition to all other fees, licenses or taxes imposed by this or any other law," and is no longer entitled to have deducted therefrom all other taxes paid by the company, under the provisions of the Insurance Law (L. 1892, ch. 690, as amd. by L. 1893, ch. 725), providing that the superintendent of insurance in collecting the tax of two per centum thereby imposed upon the amount of all premiums upon insurance against marine risks received by any foreign insurance company during the preceding calendar year, shall deduct therefrom all other taxes paid by such corporation under the laws of this state; since it is apparent from the former statute that it was the purpose of the legislature to increase the franchise tax imposed upon foreign insurance corporations to one per centum per annum, which it did, in the case of all of such corporations except fire and marine insurance corporations, by increasing the tax from five-tenths of one per centum to one per centum, but in the case of the latter corporations it effected this purpose by providing that the tax of five-tenths of one per centum per annum imposed upon such corporations should be *in addition* to the taxes authorized by other statutes, and, therefore, the provision of the Insurance Law providing for a deduction of such tax must be deemed to have been repealed by implication by the statute in question. *People v. Thames & Mersey M. Ins. Co.* 531

1901, *Ch.* 191. See par. 24, this title.

24. 1901, *Ch.* 891 — *Nassau (County of) — Invalidity of Resolution of Board of Supervisors of Nassau County, Passed April 9, 1901, Providing That Biennial Town Meetings in Said County in the Year 1903 and Thereafter Should Be Held on the First Tuesday After the First Monday in November.* A resolution, passed by the board of supervisors of Nassau county on April 9, 1901, seven days after the election of such board for the term of two years from the date of such election, providing that the biennial town meetings in said county in the year 1903 and thereafter should be held on the first Tuesday after the first Monday in November, is not supported by the statute (L. 1901, ch. 891), by which such resolution was claimed to be authorized, since the statute did not become a law until April 17, 1901, eight days after the passage of the resolution, and was not intended to be retroactive in its effect, its provisions being in terms limited to town officers "hereafter elected," and to cases where the resolution changing the town meeting is "thereafter" adopted; neither is such resolution authorized by chapter 374 of the Laws of 1900, nor by chapter 191 of the Laws of 1901, which are the only statutes, prior to chapter 391 of the Laws of 1901, authorizing boards of supervisors to provide for the holding of town meetings at the time of general elections in the fall, since the resolution in question attempted to extend the term of the town officers then in office beyond the period of two years, the term fixed for such officers by chapter 191 of the Laws of 1901, and hence the resolution was not only without statutory authority in its support, but was in violation of it, and, therefore, in violation of section 26 of article III of the Constitution, which provides that members of boards of supervisors shall be "elected in such manner and for such period as is or may be provided by law." *People ex rel. Smith v. Weeks.* 194

25. 1901, *Ch.* 466 — *New York City Charter — Board of Education, Not the City, the Proper Party Defendant in Suits Relating to School Funds.* Under the provisions of the charter of the city of New York (L. 1901, ch. 466) the only relation that the city has to the subject of public education is as the custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disburse the same according to the instructions of the board of education. The city, as trustee, has the title to the money, but it is under the care, control and administration of the board of education, and all suits in relation to it must be

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brought in the name of the board. A suit to recover teachers' wages is a suit affecting or in relation to the school funds, and under the express words of the statute must be brought against the board. *Gunnison v. Board of Education*. 11

28. *Idem*—*Board of Education an Independent Corporation, Not a City Agency*. The mere fact that the legislature has made the board of education a member of one of the administrative departments of the city of New York does not indicate an intent to devolve upon the city itself, acting through one of its departments, the state functions which were formerly directly imposed upon the board as a separate public corporation and to relegate it to an agency similar to that occupied by the police, fire, health and other city departments, of which the city is the responsible head; nor does the fact that the charter (§ 1055) expressly authorizes the board to bring suits affecting school property exclude the idea that it may also defend them and prevent it from becoming a party defendant in such cases; nor does section 1614, requiring future suits against the city to be in the corporate name of the city of New York, have any application, since such suits are not against the city but are against another, and independent corporation, namely, the board of education.

The fact that the charter enumerates among the administrative departments of the city the board of education, calling it the "Department of Education," of which the board is the head, does not make any change in the corporate powers, duties or liabilities of the board and, therefore, does not affect its legal capacity to sue and be sued.

Nor does the fact that the board is the head of the department exempt it from such suits because it is not a mere agent of the city but is an independent corporate body whose acts are not the acts of the city and for which the city is not responsible. *Id.*

See, also, paras. 14 and 22, this title.

1902, *C.A.* 270. See par. 22, this title.

SHIPPING.

Collision at sea.

See NEGLIGENCE, 3.

STOCKHOLDERS.

Action for damages resulting from conspiracy to wreck corporation must be brought by corporation not by an individual stockholder—protection of interests of minority stockholders.

See CORPORATIONS.

STREETS.

1. *Change of Grade—Proceedings for Damages Caused Thereby—Construction of Statutes Relating Thereto*. The statute (L. 1883, ch. 113, as amd. by L. 1884, ch. 281, and L. 1894, ch. 172) providing that "whenever the grade of any street * * * in any incorporated village shall be changed so as to injure or damage the buildings or real property adjoining such highway, the owners thereof may apply to the Supreme Court for the appointment of three commissioners to ascertain and determine their damages, which damages shall be a charge upon the village * * * chargeable with the maintenance of the street * * * so altered or changed," was not superseded or repealed by the provisions of the Village Law (L. 1897, ch. 414, § 159, and § 342, subd. 4), providing for the assessment and payment of damages when the grade of a street shall be changed by the authorities of a village having the exclusive control and jurisdiction of the street, except in so far as the provisions of the former statute might apply to a change of the grade of a street, within the exclusive control and jurisdiction of a village, when made by the legally constituted authorities thereof. *Matter of Torge v. Vil. of Salamanca*. 324

STREETS—*Continued.*

2. *Same—When Proceeding for Damages Caused by Change of Grade in Street May Be Instituted and Maintained under Chapter 113 of Laws of 1883—Parties to Such Proceeding.* Where a railroad crossing over a village street was changed from a grade to an undergrade crossing by the railway company and the authorities of the village, pursuant to an order of the board of railroad commissioners, acting under the provisions of the Railroad Law relating to the change of railroad crossings at grade, in furtherance of public safety (L. 1890, ch. 565, §§ 62-69), whereby an alteration of the grade of the street in front of property abutting thereon was rendered necessary, the owner of the property may institute and maintain a proceeding for the damages caused by such alteration under chapter 113, Laws of 1883, since all that is necessary to bring the case within this statute is that the grade shall be legally changed or altered; but, as the damages for which recovery is sought were caused by an improvement toward the expense of which the railroad company is required to contribute its ratable proportion, the company is entitled to be made a party to the proceeding, and to be heard therein, as provided by the Railroad Law. *Id.*

Excavations in — degree of care.

See NEGLIGENCE, 1, 2.

Private use of public streets — when reconstruction of vault under sidewalk may be made without permit.

See NEW YORK (CITY OF), 8-12.

Title of city to lands in public streets held in trust — power of legislature to prescribe that submerged land should be used for streets.

See TITLE, 2, 4.

SUBROGATION.

1. *Rights of Surety Which Has Paid Judgment Recovered in Tort Against Several Joint Tort Feasors and Has Been Subrogated to Rights of the Judgment Creditor Thereunder.* Where a surety company, having paid an indebtedness arising upon a judgment recovered in tort against several defendants, for one of whom it was surety upon an appeal from the judgment, has been subrogated, by an order of the court, to all of the rights and securities of the judgment creditor under the judgment, including those arising from a contract by which one of the judgment debtors agreed to pay a certain sum, either before, or upon, the final determination of the action, upon the payment of which the debtor was to be released from liability under the judgment, the surety company is entitled to collect the sum agreed to be paid by such debtor and have execution therefor, since the rule, that a judgment recovered in tort is extinguished by payment and that no tortfeasor who has satisfied such judgment can compel any of his joint wrongdoers to contribute, is based upon the principle that a court of equity will refuse to lend its aid to those who have been guilty of illegal conduct, or who do not come before it with clean hands, and, hence, such rule has no application to a surety company which, by a decree of the court, has been subrogated to the rights and remedies of the judgment creditor, and is, in effect, in the position of a purchaser of the judgment. *Kobb v. National Surety Co.* 233

2. *Contract By One of Several Joint Debtors under Judgment in Tort to Pay Part Thereof in Consideration of His Release Therefrom—When Such Joint Debtor Will Not Be Relieved from Contract Because of Similar Contract Made with Other Joint Debtors.* Where one of several judgment debtors, against whom a judgment in tort had been recovered, contracted with the judgment creditor, pending an appeal from the judgment, to pay a certain part of the judgment, in any event, in consideration of his release therefrom, such judgment debtor cannot be relieved from the agreement upon the ground that a surety company, which had paid the judgment in full

SUBROGATION — *Continued.*

and had been subrogated to the rights of the judgment creditor thereunder, had thereafter released another of the judgment debtors in consideration of the payment by him of his proportionate part of the judgment, where there was in both of such agreements, a reservation of the right to enforce the judgment against the other judgment debtors. *Id.*

3. *When Judgment Debtor Not Entitled to Injunction Restraining Surety from Enforcing His Agreement to Pay Part of the Joint Judgment.* Where the surety company, subrogated to the rights of the judgment creditor under such judgment, has issued an execution against the judgment debtor who agreed to pay a certain sum upon the judgment, in any event, in consideration of his release therefrom, the latter cannot maintain an action in equity to restrain the enforcement by the surety company of the judgment, through the execution, and to compel the discharge of the judgment, since a court of equity will not listen to one seeking to be relieved of his liability under a joint judgment in tort, nor will it assist him, in violation of his express agreement to escape the liability which he had contracted to pay and thereby recognized as existing under the judgment against him. *Id.*

SURETIES.

Impairment of indemnitors' rights.

See PRINCIPAL AND SURETY.

Rights of surety which has paid judgment recovered in tort against several joint tortfeasors and has been subrogated to rights of the judgment creditor thereunder — when judgment debtor not entitled to injunction restraining surety from enforcing his agreement to pay part of the joint judgment.

See SUBROGATION, 1-3.

TAX.

1. *New York City — Effect of Assessment Made While Proceeding for Condemnation of Property by City Is Pending — Tax Not a Lien, When Title Passed to City Before Confirmation of Assessment Roll.* Where the report of commissioners in condemnation proceedings instituted by the city of New York to acquire certain real estate for municipal purposes, which awarded a certain sum to the owner thereof "for land and improvements," was confirmed by the court on December 23, 1897, and the title to the property was taken thereunder by the city on July 6, 1897, the owner is not liable for the taxes levied on the property under an assessment roll in which the property was listed and valued as of the second Monday of January, 1897, where the assessment roll was not acted upon and confirmed by the municipal authorities until August 24, 1897, one month and sixteen days after the title had passed from the owner to the city; the tax never became a lien upon the land, since when the assessment valuation was made condemnation proceedings were in progress, and by due course of procedure the city became the owner of the property more than six weeks before the assessment was completed, and a tax, whether imposed upon property or upon the person of the owner on account of his ownership of the property, cannot be enforced if, before the tax becomes a lien, the city suspends its power of taxation by taking the property away from the owner through the power of eminent domain. *Buckhout v. City of New York.* 363

2. *When State Tax Deed Void for Failure of Comptroller to Give Statement of Unpaid Taxes on Land When Requested by Owner.* Where the default of a taxpayer was caused by the failure of the state comptroller or his clerks to render a proper statement of the unpaid taxes, a subsequent deed executed by the comptroller in 1886 and recorded in 1887 in pursuance of a tax sale made in 1871 for the unpaid taxes omitted from the statement cannot divest the owner of his title. *Wallace v. McEchron,* 424

TAX — *Continued.*

3. *Section 182 of the Tax Law Relating to Effect of Former Deeds Not Applicable.* Section 182 of the Tax Law (L. 1896, ch. 908), providing that a comptroller's deed which has been recorded for two years shall be conclusive evidence that the sale and proceedings prior thereto were regular and that conveyances shall be subject to cancellation, (1) by reason of the payment of such taxes; (2) by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid; (3) by reason of any defect affecting the jurisdiction upon constitutional grounds, if application is made to the comptroller or an action is brought, in the case of all sales made prior to 1895, within one year from the passage of the act, is not applicable to such a case whether treated as a statute of limitation or as a curative act, and, therefore, the fact that the owner failed to apply for a cancellation or to bring an action within the prescribed time, does not preclude him from thereafter asserting his title in an action for a partition of the property. *Id.*

4. *Section 220 of Tax Law, Imposing Transfer Tax upon the Exercise of a Power of Appointment, Constitutional.* Subdivision 5 of section 220 of the Tax Law (L. 1896, ch. 908, amd. L. 1897, ch. 284), imposing a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, * * *" is an exercise of legislative power not prohibited by the State or Federal Constitution. A transfer tax is, therefore, properly imposed upon the exercise, by a last will and testament, of a power of appointment derived from a deed executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent. *Matter of Delano.* 486

5. *Construction of Statute.* The statute applies to all powers of appointment alike, without distinction on account of the method of creation or date of creation. No tax is laid upon the powers, or on the property or on the original disposition by deed, but simply upon the exercise of the power by will as an effective transfer for the purposes of the act; and since the legislature has full and complete control of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will. The fact that there was no statute imposing a succession tax when the power was created is immaterial. That transfer is not taxed; it is the practical transfer through the exercise of the power by will that is taxed, and nothing else. *Id.*

6. *Foreign Insurance Corporation — Franchise Tax upon Fire and Marine Insurance Corporation — Effect of Chapter 118 of Laws of 1901.* A foreign marine insurance company doing business in this state must pay the annual tax of five-tenths of one per centum on the gross amount of premiums received for business done within this state during each calendar year, imposed by chapter 118 of the Laws of 1901, amending section 187 of the Tax Law (L. 1896, ch. 908, § 187), "in addition to all other fees, licenses or taxes imposed by this or any other law," and is no longer entitled to have deducted therefrom all other taxes paid by the company, under the provisions of the Insurance Law (L. 1892, ch. 690, as amd. by L. 1893, ch. 725), providing that the superintendent of insurance, in collecting the tax of two per centum thereby imposed upon the amount of all premiums upon insurance against marine risks received by any foreign insurance company during the preceding calendar year, shall deduct therefrom all other taxes paid by such corporation under the laws of this state; since it is apparent from the former statute that it was the purpose of the legislature to increase the franchise tax imposed upon foreign

TAX — Continued.

insurance corporations to one per centum per annum, which it did, in the case of all of such corporations, except fire and marine insurance corporations, by increasing the tax from five-tenths of one per centum to one per centum, but in the case of the latter corporations it effected this purpose by providing that the tax of five-tenths of one per centum per annum imposed upon such corporations should be *in addition* to the taxes authorized by other statutes, and, therefore, the provision of the Insurance Law providing for a deduction of such tax must be deemed to have been repealed by implication by the statute in question. *People v. Thames & Mersey M. Ins. Co.* 531

Admissibility of tax deed in evidence.

See EVIDENCE, 1.

TAXPAYER'S ACTION.

When allegations insufficient to support charge of fraud.

See NEW YORK (CITY OF), 6.

TELEPHONE COMPANIES.

Grant of right to construct lines obtained by fraud — ejectment, when maintainable.

See EJECTMENT, 1, 2.

TITLE.

1. *New York City — Title to Lands under Water.* The title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and acts of the legislature (L. 1807, ch. 115; L. 1826, ch. 58; L. 1837, ch. 182) was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. *Knickerbocker Ice Co. v. Forty-second St. & G. St. F. R. R. Co.* 408

2. *Title to Lands in the Public Streets Held in Trust.* The title of the city of New York in and to the lands within its public streets is held in trust for the public use. *Id.*

3. *Rights of General Public over Places Where Land Highways and Navigable Waters Meet.* The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent water, the highway is by operation of law extended by the length of the added structure. *Id.*

4. *Power of Legislature to Prescribe that Submerged Land Should be Used for Streets.* The legislature had the power in granting additional submerged lands to the city of New York (L. 1837, ch. 182) to prescribe that such lands should be used for the purpose of an exterior street to which other streets then intersecting the river should be extended. *Id.*

5. *Conveyance by the City of New York of Pier in Forty-third Street Not a Conveyance in Fee of Land Covered by the Pier — Effect of Covenants Contained in Prior Deeds of Adjoining Land under Water to Same Grantee — Action Predicated upon Title in Fee Not Maintainable.* A conveyance by the city of New York in 1852 of a pier situated in Forty-third street in the Hudson river, which street was laid out under the act of 1807 to high-water mark, and by the act of 1837 was extended to the exterior line of the city, containing the following description: "Beginning at the point formed by the intersection of the northerly side of 43rd street with the easterly line or side of 12th Avenue; running thence southerly along the easterly side of 12th Avenue to the northerly side of said pier; thence westerly 211 feet three inches; thence southerly 40 feet five inches; thence easterly 212 feet two inches, to the easterly side of 12th Avenue, and thence southerly to a point where the southerly side of 43rd street

TITLE — *Continued.*

intersects the said 12th Avenue. Together with the extent of the present width of the street with the right of wharfage thereon, and together with all and singular the tenements, hereditaments," etc., subject, however, to the right of the city to order the pier extended into the river at the expense of Lindsley, or to extend the pier at the city's expense, or to grant the right to do so to other parties if Lindsley should fail to make such extension when directed so to do, "in which case the right to wharfage, etc., at the portion of the pier extended shall belong to the parties at whose expense the extension shall be made," conveys, not the absolute fee to the land covered by the pier, but the incorporeal hereditament attached to the fee, *i. e.*, the right to maintain a pier and to collect wharfage at the foot of Forty-third street in the Hudson river, whenever that point should be located by lawful authority, since the city held the land under a public trust and could not convey it in contravention thereof, of which fact the grantee was chargeable with constructive notice, especially where by prior deeds to him of adjoining land under water, the city expressly reserved so much thereof as formed parts of Twelfth and Thirteenth avenues and Forty-third street, and he covenanted therein that at the request of the city he would construct bulkheads and that the streets should always remain public streets, and, therefore, he had actual knowledge of the limitations upon his title. Whatever, therefore, may be the rights acquired by his successors in title, they include no right to maintain an action which can only be predicated upon a title in fee. *Id.*

Foreclosure sale — when not within condemnation of champerty statute.

See CHAMPERTY.

When a deed of land bounded by and surrounding inland pond does not convey the land under waters of the pond — when deed of land surrounding pond conveys easement or right to overflow such land with waters collected and stored by dam, leaving title and benefits thereof in grantor — effect of agreement by grantor to buy back easement if not used by grantee.

See RIPARIAN RIGHTS, 1-3.

Where state tax deed void for failure of comptroller to give statement of unpaid taxes on land when requested by owner.

See TAX, 2, 3.

TITLE INSURANCE.

What is insured by policy of — reformation of policy — when insurer not liable for assessment levied on property after conveyance to insured, but before date of issuance of policy.

See INSURANCE, 1-3.

TORTS.

Rights of surety which has paid judgment recovered in tort against several joint tort feors and has been subrogated to rights of the judgment creditor thereunder — contract by one of several joint debtors under judgment in tort to pay part thereof in consideration of his release therefrom — when such joint debtor will not be relieved from contract because of similar contract made with other joint debtors.

See SUBROGATION, 1-3.

TOWNS.

Invalidity of Resolution of Board of Supervisors of Nassau County, Passed April 9, 1901, Providing that Biennial Town Meetings in Said County in the Year 1903 and Thereafter Should be Held on the First Tuesday After the First Monday in November. A resolution passed by the board of super-

TOWNS — Continued.

visors of Nassau county on April 9, 1901, seven days after the election of such board for the term of two years from the date of such election, providing that the biennial town meetings in said county in the year 1903 and thereafter should be held on the first Tuesday after the first Monday in November, is not supported by the statute (L. 1901, ch. 391), by which such resolution was claimed to be authorized, since the statute did not become a law until April 17, 1901, eight days after the passage of the resolution, and was not intended to be retroactive in its effect, its provisions being in terms limited to town officers "hereafter elected," and to cases where the resolution changing the town meeting is "thereafter" adopted; neither is such resolution authorized by chapter 374 of the Laws of 1900, nor by chapter 191 of the Laws of 1901, which are the only statutes, prior to chapter 391 of the Laws of 1901, authorizing boards of supervisors to provide for the holding of town meetings at the time of general elections in the fall, since the resolution in question attempted to extend the term of the town officers then in office beyond the period of two years, the term fixed for such officers by chapter 191 of the Laws of 1901, and hence the resolution was not only without statutory authority in its support, but was in violation of it, and, therefore, in violation of section 26 of article III of the Constitution, which provides that members of boards of supervisors shall be "elected in such manner and for such period as is or may be provided by law." *People ex rel. Smith v. Weeks.* 194

Return to certiorari to review determination of town board made by majority of board conclusive.

See CERTIORARI.

Power of town officers to alter and improve state highway.

See HIGHWAYS, 1, 2.

TRADE MARKS.

When Common English Words, or a Combination Thereof, Cannot Be Adopted as Such. An exclusive proprietary right to the use of a common English word, or a combination of such words, for the purpose of identifying the class, grade, style or quality of a commercial article, or for any purpose other than a reference to or indication of its ownership, cannot be acquired by the prior adoption and use thereof upon the label of any article, and the subsequent employment of such word or combination of words by another to describe the character, quality and use of a similar article does not constitute a trespass or infringement of a trade mark. *Barrett Chemical Co. v. Stern.* 27

TRANSFER TAX.

Section 220 of Tax Law, imposing, upon the exercise of a power of appointment, constitutional.

See TAX, 4, 5.

TRIAL.

1. *Evidence.* Where, upon the trial of an action for an accounting, an alleged incorrectness of an inventory may have been a competent and material fact, a question simply calling upon the defendant to state whether he had explained the mistakes therein to one of the plaintiffs is properly excluded in the absence of some statement or admission on their part that would be binding upon them. *Adams v. Elwood.* 106

2. *Judicial Notice.* An objection that a referee in an action for an accounting was disqualified because at the time of his appointment he was the county judge of a county having more than 120,000 inhabitants (Const. art. 6, § 20), cannot be sustained by the Court of Appeals where the last public record preceding his appointment shows the population to have

TRIAL — *Continued.*

been less than 120,000, although in fact it may have been more at the time, since in such a case that court can take judicial notice of nothing but facts authenticated by the public records. *Id.*

3. *When Question Whether Judgment for Money May Be Recovered Is Dependent upon Decision of Equitable Questions the Issue Is Not Triable by Jury, as a Matter of Right, under Code Civ. Pro. § 968.* An action brought by the executors of a decedent demanding judgment that a contract of annuity between decedent and a life insurance company be adjudged void and be canceled and set aside and that the plaintiffs recover from defendant the amount paid by decedent for the annuity with interest thereon less the amount of annuities paid with interest thereon, is an action praying for the relief that only a court of equity can grant, and the plaintiffs are not entitled to a trial by jury, as a matter of right, under the provisions of section 968 of the Code of Civil Procedure. *Dykman v. U. S. Life Ins. Co.* 299

4. *Direction of Verdict, When Improper.* The direction of a verdict in any case, where the right of trial by jury exists, constitutes reversible error if the evidence presents a question of fact. *Sundheimer v. City of New York.* 495

5. *Evidence Presenting Question of Fact.* The evidence upon the trial of an action to recover damages sustained to plaintiff's premises by flooding, alleged to have been caused by defendant's negligence in the construction and maintenance of a sewer, examined and held to present a question of fact which should have been submitted to the jury. *Id.*

When erroneous rulings upon, will not justify reversal — objection.

See APPEAL, 1, 2.

Murder — sufficiency of evidence — competency of threats made by defendant — incompetency of evidence of specific acts of violence of deceased toward third person — charge.

See CRIMES, 1-4.

Uxoricide — evidence of reputation for unchastity of defendant's alleged paramour incompetent upon the question of motive — duty of trial court as to a theory of the prosecution wholly unsupported by evidence.

See CRIMES, 5, 6.

Murder — sufficiency of evidence — insanity — when court is justified in refusing to appoint commission to examine defendant and report as to his sanity — instruction as to presumption of sanity of defendant — trial court not bound to charge request of counsel where substantially the same proposition has already been charged.

See CRIMES, 7-11.

Murder — sufficiency of evidence — absence of exceptions.

See CRIMES, 12, 13.

Murder — sufficiency of evidence — admissibility of confession procured by deception — credibility of witness thereto a question for the jury — how competency of confession is to be determined — instruction to jury.

See CRIMES, 14-17.

Indictment for policy gambling — admissibility of private papers alleged to have been unlawfully obtained — when admission of private papers not violative of constitutional guaranty against compelling prisoner to be a witness against himself — when evidence of non-existence of search warrant immaterial.

See CRIMES, 18-23.

TRIAL — *Continued.*

Admissibility in evidence of tax deed.

See EVIDENCE, 1.

Action to recover alleged agreed value of lost property — when evidence of expert admissible to show that such value was excessive.

See EVIDENCE, 2, 3.

Competency of facts showing hostility of witness — religious belief of witness.

See EVIDENCE, 4, 5.

Erroneous refusal to charge.

See NEGLIGENCE, 3.

TRUSTS.

When void intermediate trust, created by codicil, may be expunged without changing testator's plan for disposition of his property, the will must be sustained.

See WILL, 1.

Construction of clause, in will, appointing trustees residuary legatees — residuary estate resulting from invalid trust passes to such residuary legatees.

See WILL, 2.

USER.

Private use of public streets — presumption arising from lapse of time that user is with consent of public authorities may be dispelled by proof.

See NEW YORK (CITY OF), 8-12.

VERDICT.

Direction of, when improper.

See TRIAL, 4.

VETERANS.

Office of deputy tax commissioner in New York city excepted from provisions of Civil Service Law in relation to.

See CIVIL SERVICE.

VILLAGES.

Change of grade in street — proceedings for damages caused thereby.

See STREETS, 1, 2.

When contract, made by authorities of village, to purchase property of water works company invalid.

See WATER WORKS, 7, 8.

WAIVER.

Restriction of power of life insurance agents to waive conditions of contract.

See INSURANCE, 4-6.

WARRANT.

Search — when evidence of non-existence of, immaterial.

See CRIMES, 23.

WATER WORKS.

1. *Water Company Incorporated under Transportation Corporations Law (L. 1890, Ch. 566, as Amd. by L. 1892, Ch. 617) for the Purpose of Supplying Water to Towns and Villages Adjacent to a City — When It May*

WATER WORKS — Continued.

Lay Its Water Mains and Pipes through the City — When Entitled to Injunction Restraining the City from Preventing the Laying of Water Pipes. Where a water works company, duly incorporated under the provisions of the Transportation Corporations Act (L. 1890, ch. 566, as amd. by L. 1892, ch. 617), for the purpose of supplying water to certain villages and towns lying upon opposite sides of a city, has paid the organization charges imposed by the statute and has located and procured a right of way through the towns lying on the westerly side of the city, as required by the statute, and has obtained by contract with a railroad company the right to lay its water mains upon the railroad's right of way through the city and the town on the easterly side of the city to villages upon the line of the railroad, and has also entered into a contract with another corporation to construct its water plant and lay its water mains and pipes, and made agreements to supply water to a number of manufacturing establishments in the towns, outside of the city, and to supply the railroad company with the water that it requires in the city and at its stations along the route of the water company, the franchise rights of the water company have become vested thereby, and the company has the right and power, under section 82 of the statute, to lay its water mains along the route which it has adopted and located upon the railroad's right of way through the city, without the consent or permission of the authorities of the city, and is entitled to an injunction restraining the city, its officers, agents and servants, from interfering with or preventing it from laying its water pipes or mains across the streets of the city intersected by the railroad's right of way. *Rochester & L. O. Water Co. v. City of Rochester.* 36

2. *When Ordinances Adopted under Provisions of the Charter of the City Have no Application to the Laying of Water Mains through the City — When Superintendent of Water Works of City May Not Interfere with Water Pipes and Mains Passing through the City — Effect of Statutes Enacted after Water Company's Rights Have Been Acquired.* Ordinances adopted by the common council of a city, after the passage of the Transportation Corporations Law, for the purpose of regulating the opening of street surfaces for the laying of gas and water pipes and the making of sewer connections, although authorized by the charter of the city, have no application to and cannot regulate or prohibit the laying of water mains through the city by a water company organized under the statute in question for the purpose of supplying water to adjacent towns and villages, since the legislature could not have intended to vest in the common council the right to repeal or amend, by ordinance, a general statute of the state; neither do the provisions of the charter of cities of the second class (L. 1898, ch. 182) under which, in connection with special statutes not inconsistent therewith, the city, in this case, is now acting and by which the commissioner of public works is empowered to appoint a superintendent of water works to see that the city is supplied with wholesome water for public and private use, give such superintendent any power to prohibit the laying of water pipes under the general laws or control the water of a corporation organized under the Transportation Corporations Law so long as it is only passing through the city in the mains of the company for use elsewhere; nor can the vested rights acquired by the company in pursuance of its corporate purposes be affected by subsequent statutes enacted for the purpose of preventing the company from laying its pipes within the territory of the city. *Id.*

3. *When Water Works Company Not Required to Go Around City with Its Water Mains and Pipes.* Although the water company could have located its line around the city by going a longer distance through a town not named in its certificate of incorporation, it need not do so where such town does not directly intervene between the towns to be supplied with water and named in such certificate, or furnish the direct, natural and feasible route between the same. *Id.*

WATER WORKS — Continued.

4. *Possibility that Water Company May Become Competitor of City in Supplying Water to Consumers Will Not Prevent Company from Laying Water Mains and Pipes through the City.* Notwithstanding the fact that such water company may become a competitor of the city which owns and operates a municipal water plant which supplies water to its inhabitants for domestic and manufacturing purposes, and has for many years supplied water to the railroad company upon whose right of way the water company has located its route through the city and with which it has contracted to furnish water at a lower rate than that at which the city has furnished it, such fact does not affect the statutory right of the water company to run its mains through the city in order to comply with the purposes of its grant; when the company attempts to supply water to the inhabitants of the city within its territorial limits, the power to do so may then be questioned by the municipality, and the courts may then be called upon to determine the extent of its powers in that regard. *Id.*

5. *When City May Not Attack Validity of Water Company's Right of Way through the City upon Lands of Railroad Company.* Whether the water company has obtained from the railroad company a valid right of way along its lands is a question that cannot be raised by the city so long as the railroad company does not question or oppose such right. *Id.*

6. *Local Authorities Should Be Given Reasonable Control in Such Cases as to the Streets to Be Used, and the Place and Manner in Which the Pipes Should Be Laid.* While the justice of the provision which permits the laying of water pipes through an adjoining municipality, and thus preventing such municipality from depriving its neighbors from receiving a supply of water, where such municipality happens to intervene between the source of supply and the place of distribution, is fully recognized, it is suggested that the legislature might properly have placed some restriction upon the use of the streets in cities and possibly in villages that should be made by water companies; that the city or village authorities should be given some voice as to the streets that should be used, and the place and manner in which the pipes should be laid therein; and that it should not be left entirely to the judgment and discretion of the officers of the water company to place its pipes wherever they please, without regard to the wishes or reasons of the officers of the city who may desire to have them placed elsewhere. *Id.*

7. *White Plains (Village of) — Invalidity of Contract Made by Authorities Thereof to Purchase Property of Water Works Company — Agreement as to Appraisal by Arbitrators.* Where an agreement made by and between a water works company and the authorities of the village of White Plains on July 1, 1886, in which the village agreed to take and the water works company agreed to supply water for municipal and fire purposes for a period of five years at a stipulated price, contains a clause providing that the village should have the right at the end of stipulated periods to purchase the water works by giving the company one year's notice of such intention and paying to said company a valuation to be determined and appraised by a board of arbitrators, chosen as therein provided, such valuation in no case to exceed the cost of the works more than ten per cent, the purchase clause is *ultra vires* and void, and cannot be enforced by or against the village. *Matter of Bd. of Water Comrs. of White Plains.* 289

8. *Appraisal of Property of Water Works Company Made by Commissioners in Condemnation Proceedings — Illegal and Erroneous When Based upon Invalid Contract of Purchase.* Where the board of water commissioners of the village of White Plains, appointed by the statute (L. 1890, ch. 769), with power to supply the village with water and to acquire by purchase or condemnation all water, water rights and property necessary therefor, whether owned by individuals or water companies, instituted condemna-

WATER WORKS — Continued.

tion proceedings pursuant to such statute to acquire the property of a water works company then supplying the village with water under the contract of July 1, 1886, and the commissioners appointed in such proceeding instead of appraising such property, including the good will and franchise of the company, at its full value, as provided by the statute, refused to be governed thereby and determined the value of the real property and plant of the company in the manner provided for by the contract of July 1, 1886, without any award for the franchise rights of the company, such determination and award are illegal and erroneous and must be set aside and a new appraisal ordered before new commissioners to be appointed by the court. *Id.*

WHITE PLAINS (VILLAGE OF).

Invalidity of contract made by authorities thereof to purchase property of water works company.

See WATER WORKS, 7, 8.

WILL.

1. *When Void Intermediate Trust, Created by Codicil, May Be Expunged Without Changing Testator's Plan for Disposition of His Property, the Will Must Be Sustained.* Where a testator devised and bequeathed his residuary estate to his executors in trust to pay the income thereof to his wife during her lifetime, with power to sell his real estate at any time during the trust at their discretion, and after her death to transfer the residuary estate to the designated trustees of a permanent trust, and thereafter, after the death of his wife, testator executed a codicil to his will, revoking the provisions therein contained for the benefit of his wife, and directing his executors to hold the residuary estate and invest and reinvest the income thereof until the expiration of two years after his death and then to transfer the residuary estate and the accumulated income thereof to the trustees of the permanent trust, neither the will and the provisions thereof granting the power of sale, nor the provisions creating the permanent trust, are revoked or rendered invalid by the codicil, notwithstanding the direction to hold and invest both principal and income of the residuary estate for the definite period of two years after testator's death before transferring the same to the permanent trustees constituted an unlawful suspension of the power of alienation and provided for the unlawful accumulation of income in violation of the statute (Real Property Law, §§ 32 and 51; L. 1896, ch. 547), since the invalid provisions of the codicil affected neither the power of sale nor the existence of the permanent trust, but only the time of the inception of the trust, and such provisions can be expunged without making any change in the testator's plan for the disposition of his residuary estate, except that the trustees of the permanent trust take possession thereof upon the testator's death instead of two years later. *Smith v. Chesebrough.* 317

2. *Construction of Clause Appointing Trustees "Residuary Legatees" — Residuary Estate Resulting from Invalid Trust Passes to Such Residuary Legatees.* Where a testatrix gave and devised all of her property to three persons, named in her will, "to have and to hold the same to themselves, their heirs and assigns forever, upon the uses and trusts following: To pay all my debts and pay such proportions of said estate to such persons as they may ascertain and a majority shall agree to have been my expressed wish, or as I may hereafter formally designate, and I hereby nominate and constitute and appoint my said trustees residuary legatees of my estate," the use of the words "said trustees" in the residuary clause is the equivalent of specifying by name the residuary legatees who had already been designated by their several names; and, the second trust being void for indefiniteness, the residue of the estate, after the payment of debts as directed by the first trust, is a definite and ascertainable quantity, the determination of which is not dependent upon the validity

WILL — *Continued.*

or invalidity of the second trust, and passes to the residuary legatees; since it is apparent from the language used by testatrix that she intended to give her estate, after the execution of the two trusts, to the three persons named as residuary legatees, their heirs and assigns forever, so that the will stands, with the invalid trust eliminated, precisely as though the testatrix had said, I give to these three persons all my property upon the trust to pay my debts and the residue to them, their heirs and assigns forever. *Trunkey v. Van Sant*, 535

WITNESSES.

In any criminal case not compelled to give any evidence against themselves.

See CONSTITUTIONAL LAW, 2-4.

Competency of facts showing hostility of witness — religious belief of witness.

See EVIDENCE, 4, 5.

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Prohibition against use of free railroad passes by public officers applies to palace and sleeping car passes ; Const. art. 13, § 5.

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Validity of provisions of charter prohibiting maintenance of actions to set aside or annul assessments for local improvements unless commenced within prescribed time and in compliance with prescribed conditions.

Loomis v. City of Little Falls, 31, 33.

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Invalidity of resolution of board of supervisors of Nassau county, passed April 9, 1901, providing that biennial town meetings in said county in the year 1903 and thereafter should be held on the first Tuesday after the first Monday in November.

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The exaction of more than the legal rate of interest upon unsecured loans does not constitute a misdemeanor under section 378 of Penal Code. (Dis. op.)

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SUBROGATION.

Rights of surety which has paid judgment recovered in tort against several joint tort feasons and has been subrogated to rights of the judgment creditor thereunder; Contract by one of several joint debtors under judgment in tort to pay part thereof in consideration of his release therefrom; When such joint debtor will not be relieved from contract because of similar contract made with other joint debtors; When judgment debtor not entitled to injunction restraining surety from enforcing his agreement to pay part of the joint judgment.

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Jurisdiction of New York city magistrate to sentence women to state reformatory at Bedford under section 146 thereof; When conviction is for offenses enumerated therein. (Dis. op.)

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Creditor's action to compel executor to sell real estate under power of sale for payment of debts; Acknowledgment by executor prevents running of Statute of Limitations; Former adjudication dismissing proceeding for an accounting not a bar; Failure to legally serve non-resident devisee with process fatal to judgment; Erroneous direction of sale by referee.

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Howard Iron Works v. Buffalo Elevating Co., 1, 3.

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Board of education, not the city, the proper party defendant in suits relating to school funds; Board of education an independent corporation, not a city agency.

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TRADE MARK.

When common English words, or a combination thereof, cannot be adopted as such.

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Matter of Brown v. Order of Foresters, 132, 134.

BANKRUPTCY.

Discharge in, not a defense, or bar, to an action for embezzlement and misappropriation of funds; Demurrer to answer setting up same as a defense.

Watertown Carriage Co. v. Hall, 313, 314.

WILL.

When bequest of a portion of a remainder of an estate to a son of testatrix "in trust for his wife" must be construed as an absolute bequest to the son. (Dis. op.)

Matter of Gawne, 597, 598.

BARTLETT, J.

WATER WORKS CORPORATIONS.

Water company incorporated under Transportation Corporations Law (L. 1890, ch. 566, as amd. by L. 1892, ch. 617), for the purpose of supplying water to towns and villages adjacent to a city, has no right to cross the streets of the city, although upon the right of way of a railroad company, unless subject to such restrictions as to route and interference with the public streets as the local authorities may impose; Possibility that water company may become competitor of city in supplying water to consumers entitles city to injunction restraining company from laying its water mains and pipes through the city, when water company may reach the town and villages adjacent to city by another route; Effect of statutes, to prevent water company passing through the city, enacted after incorporation of the company. (Dis. op.)

Rochester & L. O. W. Co. v. City of Rochester, 36, 52.

RIPARIAN RIGHTS.

When deed conveying land surrounding inland pond for flowage purposes conveys absolute fee of the land. (Dis. op.)

Matter of Brookfield, 138, 149.

FALSE REPRESENTATIONS.

Action for damages will not lie between members of two firms having one member common to both; When firm not liable for false representations of partner.

Taylor v. Thompson, 168, 170.

INSURANCE, LIFE.

Restriction of power of agents; When provision in application for insurance that policy shall not take effect until first premium be paid thereon in full charges applicant with notice that agents without express authority have no power to waive it.

Russell v. Prudential Ins. Co., 178, 180.

COSTS.

What costs may be recovered by landowner successfully defending condemnation proceeding instituted under section 3372 of Code of Civil Procedure.

Matter of Brooklyn Union El. R. R. Co., 213, 214.

CONSTITUTIONAL LAW.

Witness in any criminal case not compelled to give any evidence against himself; When determination whether or not answer will incriminate him rests with witness; Const. art. 1, § 6; Privilege of witness provided for by section 342 of the Penal Code not co-extensive with that afforded by constitutional provision.

People ex rel. Lewisohn v. O'Brien, 253, 257.

TRIAL.

When question whether judgment for money may be recovered is dependent upon decision of equitable questions the issue is not triable by a jury, as a matter of right, under Code Civ. Pro. § 968.

Dykman v. U. S. Life Ins. Co., 299, 300.

RAILROADS.

Eminent domain; Measure of damages where a portion of a tract of land is taken.

South Buffalo Ry. Co. v. Kirkover, 301, 303.

CONSTITUTIONAL LAW.

Personal rights; Admissibility on criminal trial of private papers alleged to have been unlawfully obtained; When admission of private papers not violative of constitutional guaranty against compelling prisoner to be a witness against himself; Const. art. 1, § 6; Crimes; Policy gambling; Constitutionality of sections 344a and 344b of Penal Code; What public officers may lawfully be in possession of apparatus used in game of policy; Constitutionality of indeterminate sentence law; Penal Code, § 687a; Non-existence of search warrant immaterial.

People v. Adams, 351, 355.

ELECTION OF REMEDIES.

Assignment for creditors ; *Res adjudicata*. (Dis. op.)

Matter of Garver, 386, 395.

TRIAL.

Direction of verdict, when improper ; Evidence presenting question of fact.

Sundheimer v. City of New York, 495, 496.

HIGHWAYS.

New York and Albany post road ; Town officers of town of Hyde Park have no power to alter same ; Effect of chapter 423, Laws of 1896 ; Power of town officers of Hyde Park restricted by section 77 of the County Law relating to the alteration of state roads, (Dis. op.)

People ex rel. Dinsmore v. Vandewater, 500, 510.

EQUITY.

Creditor's action to compel executor to sell real estate under power of sale for payment of debts ; Failure to legally serve non-resident devisee with process fatal to judgment. (Con. op.)

Holly v. Gibbons, 520, 530.

HAIGHT, J.

WATER WORKS CORPORATIONS.

Water company incorporated under Transportation Corporations Law (L. 1890, ch. 566, as amd. by L. 1892, ch. 617) for the purpose of supplying water to towns and villages adjacent to a city ; When it may lay its water mains and pipes through the city ; When entitled to injunction restraining the city from preventing the laying of water pipes ; When ordinances adopted under provisions of the charter of the city have no application to the laying of water mains through the city ; When superintendent of water works of city may not interfere with water pipes and mains passing through the city ; Effect of statutes enacted after water company's rights have been acquired ; When water works company not required to go around city with its water mains and pipes ; Possibility that water company may become competitor of city in supplying water to consumers will not prevent company from laying water mains and pipes through the city ; When city may not attack validity of water company's right of way through the city upon lands of railroad company ; Local authorities should be given reasonable control in such cases as to the streets to be used, and the place and manner in which the pipes should be laid.

Rochester & L. O. W. Co. v. City of Rochester, 36, 41.

HUSBAND AND WIFE.

Liability of husband for goods purchased by wife; Wife's agency a question of fact.

Wanamaker v. Weaver, 75, 76.

CORPORATIONS.

Action for damages resulting from conspiracy to wreck corporation must be brought by corporation, not by an individual stockholder; Protection of interests of minority stockholders; Measure of damages.

Niles v. N. Y. C. & H. R. R. Co., 119, 121.

RIPARIAN RIGHTS.

When a deed of land bounded by, and surrounding, inland pond does not convey the land under the waters of the pond; When deed of land surrounding pond conveys easement, or right, to overflow such land with waters stored by dam, leaving title and benefits thereof in grantor; Effect of agreement by grantor to buy back easement if not used by grantee; Condemnation of rights of owners of waters of inland pond and rights of owners of land surrounding the pond and under waters of the same in proceeding by city of New York under chapter 189 of Laws of 1893; When owner of bed of pond entitled to substantial damages therefor.

Matter of Brookfield, 138, 142.

INSURANCE, LIFE.

Restriction of power of agents; When provision in application for insurance that policy shall not take effect until first premium be paid in full does not charge applicant with notice that agents without express authority have no power to waive it. (Dis. op.)

Russell v. Prudential Ins. Co., 178, 189.

MISDEMEANOR.

Unlawful omission to provide medical attendance for a minor child; When indictment therefor sufficient; When omission to furnish medical attendance is unlawful; Test of necessity for medical attendance; Reasonable discretion; Duty to furnish medical attendance to minor child imposed by statute on guardians, parents and those in loco parentis; Meaning of "medical attendance;" Constitutional guaranty of freedom of worship not violated by statutory requirement.

People v. Pierson, 201, 203.

WHITE PLAINS (VILLAGE OF).

Invalidity of contract made by authorities thereof to purchase property of water works company; Agreement as to appraisal by arbitrators; Appraisal of property of water works company made by commissioners in condemnation proceedings; Illegal and erroneous when based upon invalid contract of purchase.

Matter of Water Comrs. of White Plains, 239, 242.

EXECUTORS AND ADMINISTRATORS.

When payment to foreign administrator after appointment of administrator in this state discharges debt.

Maas v. German Savings Bank, 377, 379.

NEW YORK CITY.

Street improvement; When city not liable for damages caused by mistake of city surveyor in fixing grades.

Becker v. City of New York, 441, 442.

TRIAL.

Direction of verdict, when improper; Evidence presenting question of fact. (Con. op.)

Sundheimer v. City of New York, 495, 500.

HIGHWAYS.

New York and Albany post road; Power of town officers of town of Hyde Park to alter and improve same; Not affected by chapter 423 of Laws of 1896; Power of town officers of Hyde Park not restricted or affected by section 77 of the County Law relating to the alteration of state roads.

People ex rel. Dinsmore v. Vandewater, 500, 503.

TAX.

Foreign insurance corporation; Franchise tax upon fire and marine insurance corporation; Effect of chapter 118 of Laws of 1901.

People v. Thames & Mersey M. Ins. Co., 531, 532.

MARTIN, J.

EVIDENCE.

Competency of facts showing hostility of witness; Religious belief of witness.

Brink v. Stratton, 150, 151.

NEW YORK CITY.

Street improvement; When city liable for damages caused by mistakes of city surveyor in fixing grades. (Dis. op.)

Becker v. City of New York, 441, 447.

MUNICIPAL CORPORATION.

Private use of public streets; Presumption arising from lapse of time that user is with consent of public authorities may be dispelled by proof; New York city; Reconstruction of vault under sidewalk; When payment for permit involuntary; When reconstruction may be made without permit or additional compensation; Collation of statutes relating to use of public streets for vaults; When presumption of lawful user is dispelled by proof; Question of fact.

Deshong v. City of New York, 475, 477.

VANN, J.

MURDER.

Sufficiency of evidence; Competency of threats made by defendant; Incompetency of evidence of specific acts of violence of deceased to third person; Charge.

People v. Gaimari, 84, 85.

MURDER.

Sufficiency of evidence; Insanity; When court is justified in refusing to appoint commission under the statute (Code Crim. Pro. § 658) to examine defendant and report as to his sanity; Instruction as to presumption of sanity of defendant; Trial court not bound to charge request of counsel where substantially the same proposition has already been charged; Examination of alleged error in charge; When such error cannot be reviewed without an exception thereto; Effect of section 528, Code of Criminal Procedure.

People v. Tobin, 278, 280.

APPEAL.

Power of Appellate Division to reverse or affirm wholly or partly; Code Civ. Pro. § 1317.

City of Buffalo v. D., L. & W. R. R. Co., 308, 309.

MURDER.

Sufficiency of evidence; Briefs of counsel should contain a fair statement of facts; Admissibility of confession procured by deception; Code Crim. Pro. § 395; Credibility of a witness thereto a question for the jury; How competency of confession is to be determined; Instruction to jury.

People v. White, 331, 334.

TAX.

New York city; Effect of assessment made while proceeding for condemnation of property by city is pending; Tax not a lien, when title passed to city before confirmation of assessment roll.

Buckhout v. City of New York, 363, 365.

NEW YORK CITY.

Payment to de facto clerk is a defense to action for salary by de jure clerk.

Martin v. City of New York, 371, 372.

TAX.

Section 220 of Tax Law imposing transfer tax upon the exercise of a power of appointment constitutional; Construction of statute.

Matter of Delano, 486, 489.

CULLEN, J.

EJECTMENT.

Grant obtained by fraud; When plaintiff may attack its validity, although negligent in failing to read it; When resort to equitable action unnecessary; Consideration need not be returned.

Wilcox v. American Tel. & Tel. Co., 115, 116.

GUARDIAN AND WARD.

Check drawn by guardian notice to payee that fund belongs to ward; Funds mingled with those of the ward belong presumptively to ward; Burden of proof.

Cohnfeld v. Tanenbaum, 126, 129.

EVIDENCE.

Competency of facts showing hostility of witness; Religious belief of witness. (Con. op.)

Brink v. Stratton, 150, 156.

NEGLIGENCE.

When contributory negligence a question of fact; Degree of care.

Walsh v. Central N. Y. Tel. & Tel. Co., 163, 164.

MISDEMEANOR.

Unlawful omission to provide medical attendance for a minor child; Duty to furnish medical attendance to minor child imposed by statute on guardians, parents and those in loco parentis. (Con. op.)

People v. Pierson, 201, 212.

STREETS.

Change of grade; Proceedings for damages caused thereby; Construction of statutes relating thereto; When proceeding for damages caused by change of grade in street may be instituted and maintained under chapter 113 of Laws of 1883; Parties to such proceeding.

Matter of Torge v. Vil. of Salamanca, 324, 326.

MECHANIC'S LIEN.

Action to foreclose lien ; When action commenced within one year after filing lien is dismissed for lack of evidence, a new action may be commenced under Code Civ. Pro. § 405, within one year after final determination of first action.

Connolly v. Hyams, 408, 405.

PARTITION.

Parties ; When state tax deed void for failure of comptroller to give statement of unpaid taxes on land when requested by owner ; Section 132 of the Tax Law relating to effect of former deeds not applicable.

Wallace v. McEchron, 424, 425.

PLEADING.

Insufficiency of general allegation of fraud ; New York city ; Power of new East river bridge commissioners ; Ch. 789, L. 1895 ; Provisions in specifications limiting competition neither illegal nor fraudulent ; Insertion of invalid provisions of Labor Law does not render contract void.

Knowles v. City of New York, 430, 433.

CHAMPERTY.

When purchase-money mortgage not champertous.

De Garmo v. Phelps, 455, 456.

WERNER, J.

TITLE INSURANCE.

What is insured by policy of ; Reformation of policy ; When insurer not liable for assessment levied on property after conveyance to insured, but before the date of issuance of policy ; Testimony of experts not competent to support conclusion that the policy should have been different in form.

Trenton Potteries Co. v. Title G. & T. Co., 65, 67.

APPEAL.

When erroneous rulings upon trial will not justify the reversal of a judgment ; Judicial notice.

Adams v. Elwood, 106, 107.

EVIDENCE.

Action to recover alleged agreed value of lost property ; When evidence of expert admissible to show that such value was excessive ; Erroneous ruling excluding such evidence.

Hicks v. Monarch Cycle Mfg. Co., 111, 112.

CRIMES.

Uxoricide ; Evidence of reputation for unchastity of defendant's alleged paramour incompetent upon the question of motive ; Code Cr. Pro. § 542 ; Duty of trial court as to a theory of the prosecution wholly unsupported by evidence.

People v. Montgomery, 219, 221.

WILL.

When void intermediate trust, created by codicil, may be expunged without changing testator's plan for disposition of his property, the will must be sustained. Smith v. Chesebrough, 317, 320.

NEGLIGENCE.

Collision at sea ; Erroneous refusal to charge.

Grube v. Hamburg-American Steamship Co., 363, 384.

NEW YORK CITY.

Title to lands under water ; Title to lands in the public streets held in trust ; Rights of general public over places where land highways and navigable waters meet ; Power of legislature to prescribe that submerged lands should be used for streets ; Conveyance by the city of New York of pier in Forty-third street not a conveyance in fee of land covered by the pier ; Effect of covenants contained in prior deeds of adjoining land under water to same grantee ; Action predicated upon title in fee not maintainable.

Knickerbocker Ice Co. v. Forty-second St. & G. St. F. R. R. Co., 408, 412.

BUFFALO (CITY OF).

Power of commissioners under grade-crossing acts to change general plan.

Lehigh Valley Ry. Co. v. Adam, 420, 421.

STATE CHARITIES LAW.

Jurisdiction of New York city magistrate to sentence women to state reformatory at Bedford under section 146 thereof ; Conviction must be for offenses enumerated therein.

People ex rel. Clark v. Keeper, etc., 465, 467.

CERTIORARI.

Return to certiorari to review determination of town board made by majority of board is conclusive upon Appellate Division ; Separate return made by one member of board cannot be considered.

People ex rel. Lester v. Eno, 513, 517.

WILL.

Construction of clause appointing trustees "residuary legatees;" Residuary estate resulting from invalid trust passes to such residuary legatees.

Trunkey v. Van Sant, 535, 539.

PER CURIAM.**MURDER.**

Sufficiency of evidence; When judgment convicting defendant of murder will not be reversed in the absence of exceptions.

People v. Ennis, 289, 290.

APPEAL.

Modification of judgment.

Hall v. City of New York, 293, 295.

NEW YORK (CITY OF).

Interest on claim against city; Runs only from time of demand of payment.

O'Keeffe v. City of New York, 297, 298.

Deputy tax commissioner; Office of, excepted from provisions of section 21 of Civil Service Law prohibiting removal of honorably discharged volunteer firemen therefrom, except after hearing on stated charges.

People ex rel. Ryan v. Wells, 462, 463.

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